7966

(18,586.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 73.

JAMES McLOUGHLIN, PLAINTIFF IN ERROR,

vs.

THE RAPHAEL TUCK & SONS COMPANY, LIMITED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 16, 1903.

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a United States Circuit Court of Appeals for the Second Circuit.

JAMES MCLOUGHLIN, Plaintiff in Error,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Oct. 25, 1901. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between James McLoughlin, plaintiff, and The Raphael Tuck & Sons Company, Limited, defendant, a manifest error hath happened, to the great damage of the said James McLoughlin, plaintiff, as is said and appears by this complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 12th day of November, 1900, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done
2 therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of October, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. H. LACOMBE
1—73

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to forty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of James McLoughlin, plaintiff in error, against The Raphael Tuck & Sons Company, Limited, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of December, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

(Endorsed:) The U. S. circuit court of appeals for the second circuit.—James McLoughlin, plaintiff in error, *vs.* The Raphael Tuck & Sons Company, Ltd., defendant in error.—Writ of error.—A. Bell Malcomson, attorney for plaintiff in error, 132 Nassau St.—Due service of a copy of the within writ of error is hereby admitted this twentieth day of October, 1900. Goepel & Raegener, attorneys for defendant in error.

United States Circuit Court, Southern District of New York.

JAMES MCLOUGHLIN, Plaintiff,
against
RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant. }

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, this 27th day of July, in the year one thousand eight hundred and ninety-eight.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

A. BELL MALCOMSON,
Plaintiff's Attorneys.

Office and post office address, 132 Nassau street, borough of Manhattan, New York city.

(Endorsed:) United States circuit court, southern district of New York.—James McLoughlin, plaintiff, *vs.* Raphael Tuck & Sons Company, Ltd., defendant.—Summons.—A. Bell Malcomson, plaintiff's attorney.—To the defendant within named: Take notice, that upon default judgment will be taken for the sum of $8,300 *dollars* in money, with interest from the 24th day of July, 1898, besides costs according to the provisions of section 4963 of the Revised Statutes of the United States. A. Bell Malcomson, plaintiff's attorney, 132 Nassau St., New York city. I hereby certify, that on the 1st day of August, 1898, at the city of New York, in my district, I personally served the within summons upon the within named Raphael Tuck & Sons Company, Limited, by exhibiting to Chas. Kaufman, president of said company, the within original, and at the same time leaving with him a copy thereof. William Henkel, United States marshal, southern district of New York. Dated Aug. 2nd, 1898. U. S. circuit court.—Filed Aug. 2, 1898.—John A. Shields, clerk.

5 United States Circuit Court of Appeals for the Second Circuit.

JAMES MCLAUGHLIN, Plaintiff in Error,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant in Error.

Messrs. Goepel & Raegener, att'ys for defendant.

GENTLEMEN: Please take notice that I shall apply to one of the justices of this court on Monday, October 22, 1900, at the chambers thereof in the United States post office and court building, for an order directing that the complaint herein be printed in a condensed form as set forth in the annexed condensation thereof.

Dated October 19, 1900.

Yours truly,

A. BELL MALCOMSON,
Attorney for Plaintiff.

Defendant not objecting, it is ordered accordingly.

E. HENRY LACOMBE, *U. S. C. J.*

October 22, 1900.

6 Circuit Court of the United States for the Southern District of New York.

JAMES MCLAUGHLIN
against
RAPHAEL TUCK AND SONS COMPANY, LIMITED. } Complaint.

The plaintiff, by A. Bell Malcomson, his attorney, complains of the defendant and says, as follows:

I. The plaintiff is a citizen of the United States and is entitled to recover from defendant the amounts hereinafter set forth by virtue

of the statute of the United States in such cases made and provided, the facts in relation to which are hereinafter stated.

II. That defendant is a corporation formed under the laws of New York, and carrying on the business in the city of New York, and elsewhere, of printing and publishing books, prints and other articles.

III. That as a first cause of action, upon information and belief, plaintiff alleges that heretofore and on or about the first day of August, 1896, the defendant, at the city of New York, in the State of New York, did publish and issue a certain picture book or booklet entitled "Little Red Riding Hood," which was number 1700 on defendant's catalogue, and in and upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted, which notice was in the following words, "Copyright 1896 by Raphael Tuck & Sons, Ltd."

7 IV. That the said book being a proper subject of a copyright was not copyrighted by the said "Raphael Tuck & Sons Co., Ltd." or by "Raphael Tuck & Sons Co., Ltd." or by the defendant that the defendant has not obtained a copyright upon said book or any part thereof, and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided and more particularly to section 4963 of the Revised Statutes of the United States.

V. That by reason of the premises and by force of the statute in such cases made and provided and more particularly section 4963 of the Revised Statutes of the United States, an action hath accrued to the plaintiff to recover from the defendant the sum of one hundred dollars forfeited as aforesaid by virtue of said statute, the said one hundred dollars being part and parcel of the sum herein demanded.

The second to the seventieth cause of action consist- of allegations substantially the same as above statement of first cause of action in relation to books of the following numbers and names:

Second cause of action, Book No. 1701, Cinderella.
Third cause of action, Book No. 1702, Little Bo Peep.
Fourth cause of action, Book No. 1703, Little Boy Blue.
Fifth cause of action, Book No. 1704, Little Miss Muffet.
Sixth cause of action, Book No, 1705, Dick Whittington.
Seventh cause of action, Book No. 1712, Little Daisy Maid.
Eighth cause of action, Book No. 1713, Little Flower Girl.
Ninth cause of action, Book No. 1714, Little Fisher Girl.
Tenth cause of action, Book No. 1715, Little School Girl.
8 Eleventh cause of action, Book No. 1716, Little Sheperdess.
Twelfth cause of action, Book No. 1717, Little Gardener.
Thirteenth cause of action, Book No. 1730, Tom Thumb.
Fourteenth cause of action, Book No. 1731, Little Snow Drop.
Fifteenth cause of action, Book No. 1732, Robinson Crusoe.
Sixteenth cause of action, Book No. 1733, Father Tuck's Nursery Rhymes.
Seventeenth cause of action, Book No. 1734, A Day at the Farm.

Eighteenth cause of action, Book No. 1735, Playtime.
Nineteenth cause of action, Book No. 1736, Fun and Frolic.
Twentieth cause of action, Book No. 1737, Christmas Joys.
Twenty-first cause of action, Book No. 1738, Rip Van Winkle.
Twenty-second cause of action, Book No. 1739, Ali Baba and the Forty Thieves.
Twenty-third cause of action, Book No. 1740, Aladdin.
Twenty-fourth cause of action, Book No. 1741, Dolly's Dress Maker.
Twenty-fifth cause of action, Book No. 1742, Father Tuck's A B C at the Zoo.
Twenty-sixth cause of action, Book No. 1743, Spelling Bee A B C.
Twenty-seventh cause of action, Book No. 1744, Night Before Christmas.
Twenty-eighth cause of action, Book No. 1745, Our Country Cousins A B C.
Twenty-ninth cause of action, Book No. 1747, Three Jolly Sailors.
Thirtieth cause of action, Book No. 1748, Peaches.
Thirty-first cause of action, Book No. 1749, Rambles and Gambols.
9 Thirty-second cause of action, Book No. 1750, Baby's A B C.
Thirty-third cause of action, Book No. 1751, Somebody's Darling.
Thirty-fourth cause of action, Book No. 1752, from the Land of Sunshine.
Thirty-fifth cause of action, Book No. 1754, Father Christmas.
Thirty-sixth cause of action, Book No. 1755, Dolly in the Country.
Thirty-seventh cause of action, Book No. 1756, Dolly in Town.
Thirty-eighth cause of action, Book No. 1760, A B C of Fairy Tales.
Thirty-ninth cause of action, Book No. 1761, Life at the Farm.
Fortieth cause of action, Book No. 1764, Spelling Bee.
Forty-first cause of action, Book No. 1763, Picture Land A B C.
Forty-second cause of action, Book No. 1765, Father Tuck's A B C at the Zoo.
Forty-third cause of action, Book No. 1768, Country Life.
Forty-fourth cause of action, Book No. 1769, Seaside Pleasures.
Forty-fifth cause of action, Book No. 1770, Jolly Companions.
Forty-sixth cause of action, Book No. 1771, Comical Kittens.
Forty-seventh cause of action, Book No. 1772, Peep Show Pictures.
Forty-eighth cause of action, Book No. 1773, Play and Pleasure.
Forty-ninth cause of action, Book No. 1774, Fun in the Forest.
Fiftieth cause of action, Book No. 1775, Pleasure Pages.
Fifty-first cause of action, Book No. 1776, Many Surprises.
10 Fifty-second cause of action, Book No. 1777, Country Cousins A B C.
Fifty-third cause of action, Book No. 1778, Wild Animals at Home.
Fifty-fourth cause of action, Book No. 1779, Jungle Stories.
Fifty-fifth cause of action, Book No. 1780, Tom Thumb.

Fifty-sixth cause of action, Book No. 1781, Little Snow Drop.
Fifty-seventh cause of action, Book No. 1782, Robinson Crusoe.
Fifty-eighth cause of action, Book No. 1783, Father Tuck's Nursery Rhymes.
Fifty-ninth cause of action, Book No. 1784, Rip Van Winkle.
Sixtieth cause of action, Book No. 1785, Ali Baba and the 40 Thieves.
Sixty-first cause of action, Book No. 1786, Aladdin.
Sixty-second cause of action, Book No. 1787, Father Tuck's Nursery Lessons.
Sixty-third cause of action, Book No. 1789, A B C of Fairy Tales.
Sixty-fourth cause of action, Book No. 1790, Picture Land A B C.
Sixty-fifth cause of action, Book No. 1791, Life at the Farm.
Sixty-sixth cause of action, Book No. 1793, All Sorts of Stories.
Sixty-seventh cause of action, Book No. 1794, Woodland Stories.
Sixty-eighth cause of action, Book No. 1795, Little Folks and their Friends.
Sixty-ninth cause of action, Book No. 1896, Royal Children of English History.

The statement of the seventieth cause of action is as follows:

11 CCXII. That as a seventieth cause of action upon information and belief, the plaintiff alleges that heretofore and on or about the first day of August, 1896, the defendant, at the city of New York, in the State of New York, did publish and issue a certain picture book or "booklet" entitled "Days of Delight," which was number 1797 on their catalogue, and in and upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted, which notice was in the following words: "Copyright 1896 by Raphael Tuck & Sons, Ltd."

CCXIII. That said book being a proper subject of a copyright was not copyrighted by the said "Raphael Tuck & Sons, Ltd." or by "Raphael Tuck & Sons Co." or by the defendant. That the defendant has not obtained a copyright on said book or any part thereof, and that the notice impressed thereon by defendant was and is false and contrary to the statutes of the United States in such case made and provided, and more particularly to section 4963 of the Revised Statutes of the United States.

CCXIV. That by reason of the premises and by force of the statute in such case made and provided and more particularly section 4963 of the Revised Statutes of the United States, an action hath *occurred* to the plaintiff to demand and have from the defendant the sum of one hundred dollars forfeited as aforesaid by virtue of said statute, the said one hundred dollars being part and parcel of the sum herein demanded.

The seventy-first and seventy-second causes of action are stated in the same words as the seventieth except that they mention books entitled "Baby's A B C," numbered 1750, and "Father Tuck's Christmas," numbered 1754.

The seventy-third cause of action is stated as follows:

CCXXI. That as a seventy-third cause of action upon information and belief, plaintiff alleges that heretofore and on or about the 26th day of April, 1897, the defendant at the city of New York, in the State of New York, did knowingly issue and sell a certain picture book or "booklet" entitled "Rip Van Winkle," numbered 1738 on defendant's catalogue, which said book or article bore a notice of United States copyright, said notice being in the following words: "Copyright 1896 by Raphael Tuck & Sons, Ltd."

CCXXII. That said book or booklet being a proper subject of copyright was not nor was any part thereof copyrighted in this country by the said "Raphael Tuck & Sons, Ltd.," or by "Raphael Tuck & Sons Co.," or by any other person or persons; that the defendant has not obtained a copyright on said book or any part thereof and that the said notice of copyright impressed thereon was and is false and contrary to the statutes of the United States and more particularly to section 4963 of the Revised Statutes of the United States as amended, all of which facts were well known to the defendant at the time of such issue and sale.

CCXXIII. That by reason of the premises and by force of the statutes in such case made and provided and more particularly section 4963 of the Revised Statutes of the United States as amended, an action hath accrued to the plaintiff to demand and have from the defendant the sum of one hundred dollars forfeited as aforesaid by virtue of said statute, the said one hundred dollars being part and parcel of the sum herein demanded.

The causes of action from the seventy-fourth to the eighty-third, inclusive, are stated in the same words as the seventy-third clause of action except that they mention books entitled as follows:

Seventy-fourth cause of action, Book No. 1739, Ali Baba and the 40 Thieves.

Seventy-fifth cause of action, Book No. 1740, Allad-in and the Wonderful Lamp.

Seventy-sixth cause of action, Book No. 1741, Dolly's Dress Maker.

Seventy seventh cause of action, Book No. 1742, Father Tuck's A B C at the Zoo.

Seventy-eighth cause of action, Book No. 1747, Three Jolly Sailors.

Seventy-ninth cause of action, Book No. 1748, Peaches.

Eightieth cause of action, Book No. 1749, Rambles and Gambols.

Eighty-first cause of action, Book No. 1750, Baby's A B C.

Eighty-second cause of action, Book No. 1751, Somebody's Darling.

Eighty-third cause of action, Book No. 1752, The Land of Sunshine.

That all of the several acts of the defendant, of inserting and impressing said false and fictitious notice of copyright upon said books, and the knowingly issuing and selling of books with the said fictitious notice of copyright thereon, was against the form of the Revised

Statutes of the United States and contrary to the provisions of section 4963 of said Revised Statutes:

Wherefore, plaintiff demands judgment against the defendant for the sum of eight thousand three hundred dollars, together with the costs of this action to be distributed as the law directs.

A. BELL MALCOMSON,
Attorney for Plaintiff.

STATE OF NEW YORK, }
City and County of New York, } ss:

James McLoughlin, being duly sworn, deposes and says: That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be
14 alleged on information and belief, and as to those matters he believes it to be true.

JAMES McLOUGHLIN.

Subscribed and sworn to before me this 20th day of July, 1898.
PETER A. ROSS,
Notary Public.

(Endorsed:) United States circuit court of appeals.—James McLoughlin, plaintiff in error, against The Raphael Tuck & Sons Co., Ltd., defendant in error.—Notice of motion and complaint.—A. Bell Malcomson, attorney for plaintiff, 132 Nassau street, New York city.—Due and timely service of a copy of the within notice is hereby admitted.—Dated Oct. 20, 1900.—Goepel & Raegener, att'ys for def't.—U. S. circuit court.—Filed Oct. 22, 1900.—John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

JAMES McLOUGHLIN, Plaintiff,
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant. }

We hereby consent that Messrs. Goepel & Raegener be substituted as attorneys for the defendant in our place.
Dated Sept. 22, 1898.

WETMORE & JENNER,
Def't's Sol'rs.

It is so ordered.
Dated Sept. 27, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of N.Y.—James McLaughlin *vs.* Raphael Tuck & Sons Co., Ltd.—Consent and order of substitution—U. S. circuit court.—Filed Sep. 27, 1898.—John A. Shields, clerk.

15 Circuit Court of the United States for the Southern District of New York.

JAMES McLOUGHLIN
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED.

The defendant, by Goepel & Raegener, its attorneys, answering the plaintiff's complaint:

I. It has no knowledge, information or belief with respect to the matters set forth in the first paragraph of the complaint and therefore denies the same.

II. It admits that it is a corporation formed under the laws of New York and carrying on business in the city of New York and elsewhere, but it denies that it is engaged in the business of printing books.

III. It admits that at some time in the year 1896 it did at the city of New York sell certain pictures books and booklets entitled and numbered as follows:

Little Red Riding Hood	No. 1700
Cinderella	No. 1701
Little Bo-Peep	No. 1702
Little Boy Blue	No. 1703
Little Miss Muffett	No. 1704
Dick Whittington	No. 1705
Little Daisy Maid	No. 1712
Little Flower Girl	No. 1713
Little Fisher Girl	No. 1714
16 Little School Girl	No. 1715
Little Shepherdess	No. 1716
Little Gard-ner	No. 1717
Tom Thumb	No. 1730
Little Snow Drop	No. 1731
Robinson Crusoe	No. 1732
Father Tuck's Nursery Rhymes	No. 1733
A Day at the Farm	No. 1734
Play Time	No. 1735
Fun and Frolic	No. 1736
Christmas Joys	No. 1737
Rip Van Winkle	No. 1738
Ali Baba and the Forty Thieves	No. 1739
Aladdin	No. 1740
Dolly's Dressmaker	No. 1741
Father Tuck's A B C at the Zoo	No. 1742
Spelling Bee A B C	No. 1743
Night before Christmas	No. 1744
Our Country Cousins A B C	No. 1745
Three Jolly Sailors	No. 1747

	Peaches	No. 1748
	Rambles and Gambols	No. 1749
	Baby's A B C	No. 1750
	Somebody's Darling	No. 1751
	From the Land of Sunshine	No. 1752
	Father Christmas	No. 1754
	Dolly in the Country	No. 1755
	Dolly in Town	No. 1756
	A B C of Fairy Tales	No. 1760
	Life at the Farm	No. 1761
	Spelling Bee	No. 1764
	Picture Land A B C	No. 1763
	Father Tuck's A B C at the Zoo	No. 1765
	Country Life	No. 1768
	Seaside Pleasures	No. 1769
	Jolly Companions	No. 1770
	Comical Kittens	No. 1771
	Peepshow Pictures	No. 1772
	Play and Pleasure	No. 1773
	Fun in the Forest	No. 1774
	Pleasure Pages	No. 1775
17	Many Surprises	No. 1776
	Country Cousins A B C	No. 1777
	Wild Animals at Home	No. 1778
	Jungle Stories	No. 1779
	Tom Thumb	No. 1780
	Little Snow Drop	No. 1781
	Robinson Crusoe	No. 1782
	Father Tuck's Nursery Rhymes	No. 1783
	Rip Van Winkle	No. 1784
	Ali Baba and the Forty Thieves	No. 1785
	Aladdin	No. 1786
	Father Tuck's Nursery Lessons	No. 1787
	A B C of Fairy Tales	No. 1789
	Picture Land A B C	No. 1790
	Life at the Farm	No. 1791
	All Sorts of Stories	No. 1793
	Wood Land Stories	No. 1794
	Little Folks and their Friends	No. 1795
	Royal Children of English History	No. 1796
	Days of Delight	No. 1797
	Baby's A B C	No. 1750
	Father Christmas	No. 1754
	Rip Van Winkle	No. 1738
	Ali Baba and the Forty Thieves	No. 1739
	Aladdin and the Wonderful Lamp	No. 1740
	Dolly's Dressmaker	No. 1741
	Father Tuck's A B C at the Zoo	No. 1742
	Three Jolly Sailors	No. 1747
	Peaches	No. 1748

Rambles and Gambols..... No. 1749
Baby's A B C..... No. 1750
Somebody's Darling..... No. 1751
The Land of Sunshine..... No. 1752

It has no knowledge, information or belief whether the said books and booklets or any of them were sold by it on August 1, 1896, and therefore denies the same.

It denies each and every other allegation contained in the paragraphs of the complaint numbered respectively as follows:

18 3, 6, 9, 12, 15, 17, 21, 24, 27, 30, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103, 106, 109, 112, 115, 118, 121, 124, 127, 130, 133, 136, 139, 142, 145, 148, 151, 154, 157, 160, 163, 166, 169, 172, 176, 179, 182, 185, 188, 191, 194, 197, 200, 203, 206, 209, 212, 215, 218, 221, 224, 227, 230, 233, 236, 239, 242, 245, 248 and 251.

IV. It admits that the books and booklets referred to in the complaint and enumerated in the last paragraph of this answer are proper subjects of a copyright, that it did not obtain a copyright upon them, or any of them, and that the copyright notice upon them or any of them is false; but it denies each and every other allegation contained in the paragraphs of said complaint numbered respectively 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 80, 83, 86, 89, 92, 95, 98, 101, 104, 107, 110, 113, 116, 119, 122, 125, 128, 131, 134, 137, 140, 143, 146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 177, 180, 183, 186, 189, 192, 195, 198, 201, 204, 207, 210, 213, 216, 219, 222, 255, 228, 231, 234, 237, 240, 243, 246, 249 and 252.

V. It denies all the allegations contained in the paragraphs of the complaint numbered respectively 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102, 109, 108, 111, 114, 117, 120, 123, 126, 129, 132, 135, 138, 141, 144, 147, 150, 153, 156, 159, 162, 165, 168, 171, 175, 178, 181, 184, 187, 190, 193, 196, 199, 202, 205, 208, 211, 214, 217, 220, 223, 226, 229, 232, 235, 238, 241, 244, 247, 250 and 253.

VI. As a separate defense, it alleges that this action and no part thereof can be maintained for the penalties claimed or any part thereof, for the reason that this action was not commenced within two years after the alleged causes of action set forth in the complaint have arisen.

19 VII. The defendant, further answering the 79th, 80th and 81st paragraphs of the complaint herein, and as a further and separate defense to the 26th cause of action set forth and alleged in said paragraphs of the complaint, avers that heretofore, and on or about the 10th day of September, 1896, one Peter A. Ross, suing on behalf of himself and the United States of America, brought suit against this defendant in the circuit court of the United States for the southern district of New York to recover the penalties provided for in section 4963 of the Revised Statutes of the United States for an alleged violation of said statute-, by reason of the alleged insert-

ing and impressing by this defendant of a certain false and fictitious notice of copyright upon certain books and booklets; that among other causes of action stated in the complaint of said suit was the first cause of action, which said first cause of action was the same cause of action set forth and alleged in the 79th, 80th and 81st paragraphs of the complaint in this suit now pending; that said first cause of action in said former suit was set forth and alleged in the third, fourth and fifth paragraphs of the complaint in said suit in precisely the same words in which the 26th cause of action in this pending suit is set forth and alleged, with the sole exception that the words, "which was No. 1743 on their catalogue," contained in the 6th and 7th lines of the 79th paragraph of the complaint herein, did not appear in the complaint of said former suit. That said picture book or booklet, entitled, "Spelling Bee A, B, C," referred to and set forth in the complaint in said former suit, was No. 1743 on defendant's catalogue and was the same picture book or booklet referred to and set forth in the 26th cause of action in this pending suit, and that the said former suit was brought to recover the same penalty as is sought to be recovered in the 26th cause of action in this pending suit. That said former suit was duly brought on for trial and tried at a stated term of said court, on the 27th day
20 of October, 1897, before the Honorable E. Henry Lacombe, one of the judges of said court, and a jury, and that the jury thereupon rendered a verdict in favor of this defendant; for which reason the alleged 26th cause of action set forth and described in the complaint herein is *res adjudicata*.

Wherefore, the defendant demands that the complaint be dismissed, with costs.

GOEPEL & RAEGENER,
Defendant's Attorneys, 290 *Broadway*,
New York City, Manhattan.

SIRS: Please take notice that the defendant hereby elects to serve an unverified answer to the plaintiff's complaint herein, the action being to recover a penalty.

Dated New York, September 30, 1898.

Yours, &c.,

GOEPEL & RAEGENER,
Attorneys for Defendant, 290 *Broadway*,
New York City, Manhattan.

To A. Bell Malcomson, Esq., attorney for plaintiff, 113 Nassau St.

21 U. S. Circuit Court, Southern District of New York.

JAMES McLOUGHLIN
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED. } Affidavit of Service.

STATE OF NEW YORK,
County of New York, } *ss:*

Max H. Wurzel, of the city of New York, being duly sworn, says: That he is above the age of 18 years, and that on the 30th day of September, in the year one thousand eight hundred and ninety-eight, he served the annexed answer on A. Bell Malcomson, plaintiff's attorney in this action, by depositing in the general post office, in the borough of Manhattan, in the city of New York, a copy of said answer enclosed in a securely sealed post-paid wrapper addressed to said attorney, at his office address, No. 132 Nassau street, New York city, Manhattan.

MAX H. WURTZEL.

Sworn to before me this tenth day of October, 1898.

JAMES BEVERIDGE,
Notary Public, Kings County.

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of N. Y.—James McLoughlin *vs.* Raphael Tuck & Sons Co., Ltd.—Answer.—Goepel & Raegener, att'ys for deft 290 Broadway, New York.—U. S. circuit court.—Filed May 1, 1900.—John A. Shields, clerk.

22 At a stated term of the circuit court of the United States of America for the southern district of New York, in the borough of Manhattan, in the city of New York, on Wednesday, the 11th day of April, in the year of our Lord one thousand nine hundred.

Present: The Honorable E. Henry Lacombe, circuit judge.

JAMES McLOUGHLIN
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED. }

Now comes the plaintiff, by A. Bell Malcomson, Esq., his attorney. Likewise come the defendants, by Louis C. Raegener, Esq., their attorney.

Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the evidence for the respective parties Mr. Raegener moves to direct a verdict for the defendants. Motion granted.

Thereupon, by direction of the court, the jury say they find a verdict for the defendant, and so they say all.

A stay of 60 days granted the plaintiff, within which to make and serve a case with leave to turn the same into a bill of exceptions.

(An extract from the minutes.)

[SEAL.] JOHN A. SHIELDS, *Clerk.*

23 Circuit Court of the United States, Southern District of New York.

JAMES MCLOUGHLIN
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED.

This cause having been regularly brought on for trial, and tried at a stated term of the circuit court of the United States for the southern district of New York, held at the court rooms of said court, in the city of New York and southern district of New York, before Hon. E. Henry Lacombe and a jury, on the 11th day of April, 1900; and the jury having returned a verdict in favor of the defendant, and the costs and disbursements having been duly taxed at the sum of $49.85;

Now, upon motion of Messrs. Goepel & Raeg-ner, attorneys for the defendant, it is

Ordered, adjudged and decreed, that the defendant Raphael Tuck & Sons Co. Ltd., do recover of the plaintiff, James McLoughlin, the sum of $49.85, its costs and disbursements as taxed herein by the clerk of this court, and that said defendant have execution therefor.

Judgment signed this 1st day of May, A. D. 1900.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States circuit court, southern district of New York.—James McLoughlin *vs.* Raphael Tuck & Sons Co., Ltd.—Judgment.—Goepel & Raegener, att'ys for def't., 290 Broadway, New York.—U. S. circuit court, Filed May 1, 1900, 11 a. m.—John A. Shields, clerk.

24 United States Circuit Court, Southern District of New York.

JAMES MCLOUGHLIN, Plaintiff,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered that afterward, to wit, on the 11th day of April, 1900, at a stated term of this court, begun and held in the city of New York, in and for the southern district of New York, before his honor, E. Henry Lacombe, judge, and a jury, the issues joined in the above stated cause between the above said parties came on to be

tried, the plaintiffs being represented by A. Bell Malcomson, Esq., and the defendant being represented by Louis C. Raegener, Esq., and upon the trial of said issues, the attorney for the said plaintiff to maintain and prove said issues upon his part offered in evidence.

At the opening of the trial of this case the following admissions of fact were made on behalf of the parties in order to save the introduction of testimony in relation thereto.

Mr. MALCOMSON: The allegation of the complaint is that on or about the first day of August, 1896, the defendant published and issued a certain book, and that he inserted and impressed upon that book the false copyright mark.

The COURT: That is your case.

Mr. MALCOMSON: Yes, sir.

25 The COURT: What is the name of that book?

Mr. MALCOMSON: The number is 1700, and the name of the book is "Little Red Riding Hood."

The COURT: That was sold at the time and with the notice impressed?

Mr. MALCOMSON: Yes, sir.

The COURT: Now, Mr. Raeg-ner, you admit the sale on that date?

Mr. RAEGENER: Yes, sir.

The COURT: You admit that the copyright notice was not true—it had not been copyrighted here?

Mr. RAEGENER: If you will look at the original answer, you have the numbers and everything.

The COURT: You also admit that the copyright notice on that was false, do you?

Mr. RAEGENER: Yes, sir.

The COURT: Do you admit that the book came from abroad?

Mr. MALCOMSON: In 1896, yes.

The COURT: Is there anything else you need to make out your cause of action as to that?

Mr. MALCOMSON: Yes, sir.

The COURT: What else?

Mr. MALCOMSON: The testimony of the manufacturer in Germany that he received his direction to put that notice on that book from this defendant.

The COURT: Will you concede, for the purposes of the present trial of this cause of action, without prejudice to controverting it hereafter at any future time, that the notice was impressed upon that book under the authority of the defendant?

Mr. RAEGENER: I will.

The COURT: Very well; that is conceded. That is your first cause of action.

Mr. MALCOMSON: That is the first cause of action, and the same allegations are made down to the 70th cause of action.

The COURT: Will you make the same admission down to that, Mr. Raegener?

Mr. RAEGENER: I will.

The COURT: Do you in like manner make the same admission that those books came from abroad into this country prior to March 3, 1897?

26

Mr. MALCOMSON: Yes, sir.

The COURT: Now, we have the testimony taken in seventy causes of action. Now, the 71st.

Mr. MALCOMSON: The 71st cause of action, the complaint alleges that heretofore, and on or about the 11th day of June, 1897, the defendant, at the city of New York and State of New York, did knowingly issue and sell a certain picture book entitled "Baby's A B C." numbered 1750 on defendant's catalogue, which said book bears a notice of United States copyright, said notice being in the following words: "Copyright, 1896, by Raphael Tuck & Sons Co., Limited."

The COURT: Don't read any more than is necessary.

Mr. MALCOMSON: "All of which facts were well known to the defendant at the time of such issue and sale." That is No. 1750.

Mr. RAEGENER: What is the date?

The COURT: June 11, 1897, the date of sale, the 71st cause of action.

Mr. MALCOMSON: And that was in violation of the Revised Statutes as amended in 1897.

Mr. RAEGENER: What is the 72d? Give the number and the name and the date.

Mr. MALCOMSON: The next number, in the 72d cause of action, is 1754, "Father Christmas." The same allegation.

The COURT: That is the same.

Mr. MALCOMSON: The same date, the 11th of June.

The COURT: These two are alike as to date and everything else.

Mr. RAEGENER: I make the same admission. I am ready to prove in two minutes that those books were imported in 1896.

The COURT: You make the same admission?

Mr. RAEGENER: Yes, sir.

The COURT: You, however, do not admit that the books were imported from abroad prior to March 3, 1897?

27

Mr. MALCOMSON: I do not.

The COURT: Your cause of action as to that is complete.

Mr. RAEGENER: All the causes of action from the 73d to the 83d, inclusive, allege sale on or about April 26, 1897. I make the same admission with reference to them, and I have carefully collated the numbers.

The COURT: Let us have the numbers.

Mr. RAEGENER: 1738, 1739, 1740, 1741, 1742, 1747, 1748, 1749, 1750, 1751, 1752.

The COURT: 1750 was the first cause of action.

Mr. MALCOMSON: These books, some of them are in linen and some in paper.

Mr. RAEGENER: 1752 is the 83d and last cause of action. They are all as of April 26th, 1897.

The COURT: You admit the sale and admit false notice?

Mr. RAEGENER: Yes, sir.

The COURT: You admit that it was impressed by the authority of the defendant?

Mr. RAEGENER: Yes, sir.

The COURT: It puts you to the proof to show affirmatively that they got in here before March 3d, 1897.

Mr. RAEGENER: As soon as you ask me to call my witness I will do so.

The COURT: That makes out your cause of action?

Mr. RAEGENER: Yes, the whole eighty-three.

The COURT: There were only eighty-three?

Mr. MALCOMSON: Eighty-three, yes.

The COURT: And the plaintiff rests.

(Plaintiff rests.)

28 SAMUEL GABRIEL, sworn and examined as a witness for the defendant.

Mr. RAEGENER: It is understood that we are limited to this particular inquiry, your honor?

The COURT: Yes, the cross cannot go beyond the direct.

By Mr. RAEGENER:

Q. What connection have you with the defendant?

A. I am secretary and treasurer of the Raphael Tuck & Sons Company, Limited, New York.

Q. You are familiar with the subject matter of this controversy and you have heard some of the admissions here?

A. Yes, sir.

Q. The admissions that were made just now are as follows: That the defendant sold a book known as No. 1750, and another known as 1754, on June 11th, 1897. Will you please tell us when those two books were imported into the United States?

Mr. MALCOMSON: You are referring to exhibits now. There is a difficulty about putting the exhibits in. There were probably thousands of those books.

Mr. RAEGENER: Any of that number—1750 or 1754?

The WITNESS: Am I permitted to tell the story in my own way?

The COURT: No. Answer the question.

Q. Those that you sold on the 11th of June, 1897. Before what date, in what year were they imported?

A. They must have been imported in 1896. There is one exception to that, 1742.

The COURT: You are asked about 1750 and 1754. Give careful attention to the question and only answer the question. Nobody asked you about 1742.

The WITNESS: The books were imported in 1896.

Q. The books which I have referred to in my question?

A. Yes, sir.

29 Q. You know the numbers and the names of the books which are referred to in the 83 causes of action in this suit, do you not?

Objected to. Objection overruled. Exception by plaintiff.

A. I do.

Q. Please tell the court and jury what number, what book, was imported in the year 1897, with the number the same or like that referred to in the complaint?

Mr. MALCOMSON: I object to that. That does not meet the point at all. It is irrelevant? "With the number"—we have here a book with the name.

Mr. RAEGENER: You can cross-examine about it.

Mr. MALCOMSON: Your question is misleading. Give him the name.

Objection overruled. Exception by plaintiff.

A. 1742.

By the COURT:

Q. These numbers which we have heard so much about I suppose are your stock numbers or sample numbers, by which you know the various books?

A. The stock numbers, by which we recognize them.

By Mr. RAEGENER:

Q. Then, in order that we may understand you correctly, you wish to say that with the exception of a book or books bearing the number 1742 all the other books that have been referred to in this litigation were imported in 1896; is that so?

A. Yes, sir.

Q. Now, we come down to the Book 1742. Do you know when the book or books with that number were imported into this country?

A. Yes, sir.

Q. When?

A. In May, 1897.

Q. Did those books have the copyright notice on?

A. No, sir.

30 Q. Then the book referred to as 1742, and which is referred to in the 77th cause of action, and which it is alleged the defendants sold on or about April 26, 1897, did not have the copyright notice on?

A. It certainly did not.

Mr. MALCOMSON: I move to strike that testimony out as not being relevant, because plaintiff has admitted here certain facts, without putting a witness on the stand, and putting exhibits in evidence, which we have done on your honor's suggestion, so as to save time. We should not be prejudiced by that course. The witness is asked a general question as to certain books. Now the books are here and

the proper evidence is, "Will you say that that book"—which we would have proved was purchased from them at a certain time——

The COURT: You will have an opportunity on cross-examination to show him any book you want to. You can go into details.

Mr. RAEGENER: Produce your 1742 and show it to him. You have not got it.

Mr. MALCOMSON: I make the motion that it is irrelevant.

The COURT: Motion denied. Exception.

Mr. RAEGENER: We expected all the invoices to be produced here in court. Now, I state to the court the invoices are here, and not a single one of the 1897 invoices that we have show any number that has been referred to except the number 1742. With respect to that number, if he is not satisfied with this proof here, I have the bookkeeper and the men that handled the books who will swear that the 1742 book, the one book which happened to come in the May invoice in May, 1897, did not have the mark on. Not another book that is referred to here by number did we import in 1897.

The COURT: Now proceed with your cross-examination.

31 Mr. MALCOMSON: We had testimony before that the defendant knew nothing whatever about the manufacture of these books.

The COURT: Go on with your cross-examination.

Cross-examination by Mr. MALCOMSON:

Q. Look at the book I show you now; take it in your hand. That is one of the books that was sold by your firm, by the defendant, and that is one of the books that admittedly was sold in 1897.

Objected to. Objection overruled.

A. Yes, sir.

Q. And it is one of the books that you referred to when you were examined on direct, as having been sold by your firm in April, 1897?

A. I don't know what you refer to.

By the COURT:

Q. Can you tell what time that book was sold?

A. This particular book?

Q. Yes.

A. No, sir.

Q. Can you tell whether or not it was imported prior to March 3, 1897?

A. Yes, sir; it was imported in 1896.

By Mr. MALCOMSON:

Q. How can you tell?

A. Because none of the publications ordered in 1895 and imported in 1896 were brought here in 1897.

Q. How do you know that?

A. In the first instance, because it is the rule; in the second instance, I have taken trouble to examine that and have gone into it very carefully.

Q. And have you personal knowledge in relation to that book?

A. I have.

Q. Tell us when that book itself was imported, according to your personal knowledge?

A. The book was imported throughout the year 1896.

Q. What time throughout the year?

A. Between——

Q. That particular book?

32 A. This particular book. This is one of an edition of probably ten thousand. I could not tell when this particular book arrived.

Q. Then how can you speak of your personal knowledge as to when it was imported if you cannot tell when it arrived?

A. Because they were brought to be delivered for the season of 1896.

Q. Answer my question?

The COURT: Don't interrupt the witness. He is trying to answer the best he can. He cannot tell the day any one book was imported. He tells you the whole edition came from time to time during the year 1896. He cannot tell you that on the 15th of July or the 17th of September this one particular copy came in.

Mr. MALCOMSON: This is an exhibit that is here in evidence, and that is what I want to know about.

The COURT: All he tells you is that that is one of an edition of probably ten thousand, and the whole ten thousand came in in 1896. You might ask him from now until we all got tired sitting here and he could not tell you more than that.

Mr. MALCOMSON: We have nothing to go by except this book, and we want his personal knowledge as to this book. He says he has a general idea.

The COURT: He cannot give you any personal knowledge as to that book; he says it is part of an edition, and the whole edition came here in 1896. I don't see that you can gain anything by further cross-examination on that point.

Mr. MALCOLM-: I will offer this book in evidence. The method of proceeding has rather interfered with the plaintiff's case. I wanted to do it in order to save time.

The book is marked Exhibit I.

Q. Please look at the rest of these books that I show you and state if you have any personal knowledge of when those books were imported to this country (showing witness books)?

A. I have.

Q. Those individual books?

A. Yes, sir; I have.

33 Q. Did you see them imported? Did you see them pass through the custom house?

A. No, sir, but I saw the majority when they arrived from the custom house.

Q. Did you see all those books marked as those books are as they passed through or were received by the defendant from the custom house?

A. I saw the largest number of them as they arrived from the custom house.

Q. Answer my question?

A. I am not a custom house official. I don't see them pass through the custom house.

Q. Did you have anything to do with the entry? Did you go to the custom house and assist in the entry and passage through the custom house of those books?

A. Quite possibly.

Q. It may be possible, but I want to know if it is the fact?

A. When I was in New York I attended to the custom house part of the work.

Q. Will you say that you attended to the custom house work of passing through the custom house those books which are before you now?

A. A portion of them, yes.

Q. Which portion of them?

A. I can't tell you.

Q. Can you tell me that you personally conducted the entry of any one of these books that are before you?

A. No, sir.

Q. You have no personal knowledge of the actual entry, or time of entry of those books which are before you now, have you?

A. Yes; I have personal knowledge that they were all imported during 1896.

Q. That all of those were?

A. All these books.

Q. But that personal knowledge is simply your statement that there was an edition of those books, and your statement that the edition came here in 1896; that is all, is it not?

A. Edition is delivery. It is the same thing.

Q. That is all the knowledge that you have?

A. And a knowledge of the fact that the books were on our premises—in our establishment.

Q. The books were in your establishment in 1897, weren't they?

A. Possibly some were there in 1897, but they were also there in 1896.

34 Q. But they were imported from time to time?

A. Not in 1897; there is no question about that.

Mr. MALCOMSON: That is proving a negative, your honor. I move to strike the answer out.

The COURT: Motion denied. Exception.

Q. I want your personal knowledge as to those individual books?

The COURT: Hasn't he given you that now, as fully as he can?

Mr. MALCOLMSON: I want to know whether he has any personal knowledge as to those individual books. His testimony as to general rules, and editions, and orders for delivery in 1896, does not answer the question as to these particular books.

The COURT: I supposed it sufficiently appeared already on the record that the witness, as to any one of those particular books that lie on the desk before him, cannot swear that he ever saw that one particular book before. I suppose that is so, isn't it?

The WITNESS: Certainly.

Mr. MALCOMSON: And he cannot swear as to when any one of those particular books entered through the custom house.

The COURT: Certainly, that is the same as the other.

Q. You cannot say when any one of those particular books were entered through the custom house?

A. Except that they were entered in 1896.

Plaintiff's counsel moves to strike out the answer.

Motion denied. Exception.

Q. If you cannot say when any one of those individual books passed through the custom house, how can you say, unless you passed every one of such books through the custom house, when they were imported into this country?

A. By referring to the invoices. I have studied these
35 invoices and found that during 1897 not one of the books in the complaint, 1742 excepted, arrived in this country.

Q. Do you mean to say that they could not arrive in this country except by your invoices?

Objected to.

The COURT: You are charging the sale by this house. Of course, the book may have come in somebody's trunk, coming back from Europe.

Mr. MALCOMSON: Exactly.

The COURT: This defendant is not responsible for those books, of course.

Mr. MALCOMSON: The cause of action.

The COURT: Don't take up any more time to argue the question. I have given your cases more time than they are really entitled to, both of them. Go on and try the case, and register the objection.

Mr. MALCOLMSON: This is not for the importation; it is for the sale, and the point of who might have imported them is not material.

The COURT: Go on and ask the question. That this defendant might have imported them is not material in this case.

Mr. MALCOMSON: I want the witness's testimony as to whether he can testify that those books were not brought into this country in 1897?

The COURT: If you want any more ask him another question.

Q. Are you willing to swear of your own personal knowledge that those books were not brought into this country in 1897?

A. No, I will not swear.

Redirect-examination by Mr. RAEGENER:

Q. Your house did not get books in any other way except in the regular course of business and in connection with invoices that passed through the New York custom house?

Objected to. Objection overruled. Exception by plaintiff.

A. Certainly.

(Defendant rests.)

36 Mr. RAEGENER: I move for the direction of a verdict in favor of the defendant.

The COURT: A verdict is directed in favor of the defendant, with an exception to the plaintiff.

The plaintiff is allowed a stay of sixty days to make a case.

In order that matters produced and offered in evidence on the trial and the exceptions to the rulings and decisions of the judge may appear upon the record of the court, the plaintiff has prepared and caused to be settled this bill of exceptions in accordance with the statutes in such case made and provided. The court hereby signs and orders this bill of exceptions to be filed.

E. H. LACOMBE,
U. S. Circuit Judge.

Foregoing case accepted without amendments and above order consented to October 11, 1900.

GOEPEL & RAEGENER.
Def't's Att'ys.

(Endorsed:) U. S. circuit court.—James McLoughlin, plaintiff, against The Raphael Tuck & Sons Co., Limited, defendant.—Case and exceptions.—A. Bell Malcomson, attorney for plaintiff, 132 Nassau street, New York city.—Due and timely service of a copy of the within case and exceptions is hereby admitted. Dated May 28th, 1900. Goepel & Raegener, attorneys for def't.—U. S. circuit court.—Filed Oct. 12, 1900.—John A. Shields, clerk.

37 The Circuit Court of the United States for the Southern District of New York.

JAMES MCLOUGHLIN, Plaintiff, vs. THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendants.	At Law. Assignment of Errors.

Afterwards, to wit, on the 11th day of October, 1900, before the justices of the United States circuit court of appeals in the second

circuit in the United States post office and court house building, in the city of New York, comes the said James McLoughlin, by A. Bell Malcomson, his attorney, and says that, by the record proceedings aforesaid, there is manifest error in this, to wit:

First. That the defendant, having impressed, or authorized the impressing and printing, of the false notice of copyright on the books mentioned in the complaint, it was liable under the statute in force at the time of such impression, and the court erred in directing a verdict for defendant in relation thereto.

Second. That the court erred in directing a verdict for defendant as to the books mentioned in the 71st to the 83d causes of action, inclusive, in view of the admissions and testimony.

38 Third. That the court erred in rendering judgment in favor of the defendant and against the complainant.

A. BELL MALCOMSON,
Attorney for Plaintiff.

(Endorsed:) U. S. circuit court, S. D., N. Y.—James McLoughlin pl'ff, *vs.* The Raphael Tuck & Sons Co., Ltd., def't.—Assignment of errors.—U. S. circuit court.—Filed Oct. 18, 1900.—John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JAMES MCLOUGHLIN, Plaintiff,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant.
} Bond for Damages and Costs.

Know all men by these presents, that we, James McLoughlin, William J. Rigney and F. D. Maher, all of the city of New York, State of New York, are held and firmly bound unto the above named Raphael Tuck & Sons Company, Limited, in the sum of two hundred and fifty dollars, to be paid to the said Raphael Tuck & Sons Company, Limited, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and

39 each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 28th day of September, in the year of our Lord one thousand nine hundred.

Whereas, the above named James McLoughlin has prosecuted a writ of error to the United States circuit court of appeals for the second circuit to reverse the judgment rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York, and filed in the office of the clerk of the said court on the first day of May, 1900, for $49.85;

Now, therefore, the condition of this obligation is such that if the above named James McLoughlin shall prosecute said writ of error

to effect and answer all damages and costs, if he shall fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JAMES McLOUGHLIN.
WILLIAM J. RIGNEY.

Sealed and delivered and taken and acknowledged this twenty-ninth day of September, 1900, before me, — William J. Rigney.

HENRY DISTLER,
[SEAL.] *Notary Public* (*No.* 7), *Kings Co., N. Y.*

Sealed and delivered and taken and acknowledged this second day of October, 1900, before me, — F. D. Maher.

F. D. MAHER.

EMIL T. FUESS,
[SEAL.] *Notary Public* (*No.* 69), *New York Co., N. Y.*

40 UNITED STATES OF AMERICA, } *ss.:*
Southern District of New York, }

William J. Rigney, being duly sworn, does depose and say: That he is worth the sum of more than five hundred dollars over and above all his just debts and liabilities.

WILLIAM J. RIGNEY.

Sworn to this twenty-ninth day of Sept., A. D. 1900, before me

HENRY DISTLER,
[SEAL.] *Notary Public* (*No.* 7), *Kings Co., N. Y.*

F. D. Maher, being duly sworn, does depose and say: That he is worth the sum of more than five hundred dollars over and above all his just debts and liabilities.

F. D. MAHER.

Sworn to this second day of October, A. D. 1900, before me

EMIL T. FUESS,
[SEAL.] *Notary Public* (*No.* 69), *N. Y. Co., N. Y.*

(Endorsed:) U. S. circuit court, southern district of New York.—James McLoughlin, pl'ff, *vs.* The Raphael Tuck & Sons Company Ltd., defendant.—Bond for damages and costs on appeal.—Approved as to form and also as to sufficiency of sureties, with reservation however to the defendant of the right at any time to examine the sureties under oath, touching their assets, liabilities and financial condition generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court.—Filed Oct. 18, 1900.—John A. Shields, clerk.

41 United States Circuit Court of Appeals for the Second Circuit.

JAMES MCLAUGHLIN, Plaintiff in Error,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant in Error.

It is hereby stipulated that the books referred to at the trial, and used as exhibits, may be used at the argument on appeal herein and need not be printed.

GOEPEL & RAEGENER,
Defendant's Attorneys.

(Endorsed:) James McLaughlin *vs.* Tuck.—Stipulation.—U. S. circuit court.—Filed Nov. 13, 1900. John A. Shields, clerk.

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To The Raphael Tuck & Sons Company, Limited, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York,
42 in the district and circuit above named, on the 12th day of November, 1900, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein James McLoughlin is plaintiff and you are defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 18th day of October, in the year of our Lord one thousand nine hundred, and of the Independence of these United States the one hundred and twenty-fifth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals for the second circuit.—James McLoughlin, pl'ff in error, *vs.* The Raphael Tuck & Sons Company, def't in error.—Citation.—Service of a copy of within citation hereby admitted this 20th day of Oct., 1900.—Goepel & Raegener, att'ys for def't.

43 United States Circuit Court of Appeals for the Second Circuit, October Term, 1901.

Submitted February 6, 1902; decided April 8, 1902.

JAMES MCLAUGHLIN, Plaintiff in Error,
vs.
RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant in Error. } No. 8.

Error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Shipman, and Townsend.

WALLACE, *Circuit Judge:*

This is a writ of error by the plaintiff in the court below to review a judgment for the defendant upon a verdict rendered by the direction of the court. The action was brought to recover penalties because of the sale by the defendant of certain books upon which were impressed a false notice of copyright. The complaint set forth eighty-three causes of action. Of these the first seventy-two allege that the defendant published and issued in August, 1896, at the city of New York, a book or booklet, and in or upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted. The remaining eleven causes of action allege that the defendant in April, 1897, at the city of New York, did knowingly issue and sell a certain book or booklet bearing a false and fictitious copyright notice.

The first seventy two causes of action are founded upon the statute as it read before the amendment of March 3rd, 1897. The eleven remaining causes of action are founded upon the amended statute.

44 Prior to the amendment of March 3, 1897, the statute subjected "every person who shall insert or impress such notice, or words of the same purport, in or upon any book * * * for which he has not obtained a copyright in the United States," to a penalty of $100, recoverable one-half for the person who shall sue for such penalty and one-half for the use of the United States. By the amendment of 1897 the statute was extended so as to subject to the penalty not only every person who inserts or impresses such false notice of copyright upon any book, but also every person "who shall knowingly issue or sell any article" bearing such a false notice; "Provided, that this act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof."

Upon the trial of the action it appeared that the defendant imported in 1896 from a foreign country the books described in the

several counts of the complaint; that these books bore a false copyright notice; that this notice was impressed upon them in Germany by the publisher by the authorization of the defendant; and that in 1896 the defendant sold in this country the books described in the first seventy-two counts of the complaint, and subsequent to March 3, 1897, sold in this country the books described in the eleven remaining counts.

We are of the opinion that the court below correctly ruled that upon the facts shown the defendant was not liable. Treating the insertion of the copyright notice in Germany as the act of the defendant, the act was not within the purview of the statute. The penal laws of one State or sovereignty can have no operation in another. As said in *Flash v. Conn.* (109 *U. S.*, 376), "They are strictly local, and affect nothing more than they can reach." In *Charles v. The People* (1 *N. Y.*, 180) the court said: "Our legislature has no extra-territorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within this State." Until the amendment of 1897 the importation or the sale of an imported book, having a
45 copyright notice known to be false impressed upon it, was not prohibited; and the defendant in bringing the books here and selling them here was within its legal right, however reprehensible its conduct may have been. The defendant did not violate the statute by impressing the false notice upon the books in Germany, nor by selling the books in this country knowing the false notice to have been impressed upon them. It committed an act in Germany which if it had been done here would have been penal, but nothing which was done by it here was prohibited by the statute in force in 1896; nor did it by doing both of these things alter the statutory character of either act. The statute did not reach the case, and is not to be extended by interpretation to a transaction outside its scope. It was doubtless in recognition of the defect in the statute, and of the facility with which it could be evaded by unscrupulous book dealers, that the amendments of 1897 were passed. The sale of the books by the defendant subsequent to the amendment would probably have subjected the defendant to the penalty had not the proviso industriously excluded such a sale from the operation of the amendment.

The judgment is affirmed.

A. Bell Malcomson, for the plaintiff in error.
Louis C. Raegener, for the defendant in error.

46 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post office building in the city of New York, on the 18th day of April, one thousand nine hundred and two.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, Hon. William K. Townsend, circuit judges.

JAMES McLOUGHLIN, Plaintiff in Error,
vs.
RAPHAEL TUCK & SONS CO., Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said circuit court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.

Endorsed: United States circuit court of appeals, second circuit. James McLoughlin *vs.* R. Tuck & Sons Co. Order for mandate. United States circuit court of appeals, second circuit. Filed Apr. 21, 1902. William Parkin, clerk.

47 Supreme Court of the United States.

JAMES McLOUGHLIN, Plaintiff in Error,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LIMITED, Defendant in Error.

Assignment of Errors.

Afterwards, to-wit, on the 25th day of April, 1902, before the justices of the Supreme Court of the United States at the Capitol, in the city of Washington, comes the said James McLoughlin, by A. Bell Malcomson, his attorney, and says that, by the record proceedings aforesaid, there is manifest error in this, to-wit:—

First. That there is nothing in the said record to justify the conclusion of the honorable circuit court of appeals that the impressing of the false notice of copyright on the books mentioned in the complaint was done outside of the United States.

Second. That it was error in the honorable circuit court of appeals to conclude that the inserting and impressing, on the books mentioned in the complaint, of the false notice of copyright as admitted by defendant, was done or consummated elsewhere than at the city of New York as alleged in the counts of the complaint.

48 Third. That the honorable circuit court of appeals erred in sustaining the judgment and ruling of the trial court in re-

ceiving testimony from defendant contradicting the fact that the Book 1742 had the false notice of copyright on it, and the action of said trial court in refusing to strike out and disregard such testimony.

Fourth. That it was error in the honorable circuit court of appeals to sustain the judgment and ruling of the trial court on the first seventy causes of action and that said circuit court of appeals erred in sustaining the direction of a verdict for defendant by the trial court.

Fifth. That the honorable circuit court of appeals erred in finding there was reliable proof offered on the trial that the books mentioned in the 71st to the 83rd causes of action were brought into this country prior to the passage of the amendatory act, or that the said books were shown to come under the proviso of the amendatory act of March 3, 1897.

A. BELL MALCOMSON,
Attorney for Plaintiff.

Service of a copy of the foregoing assignment of errors is hereby admitted this 23rd day of May, 1902.

DICKERSON, BROWN & RAEGENER,
Defendant's Att'y.

49 Circuit Court of Appeals of the United States of America.

JAMES MCLOUGHLIN, Plaintiff,
vs.
THE RAPHAEL TUCK & SONS CO., LTD., Defendant.
} Bond for Damages and Costs.

Know all men by these presents, that we, James McLoughlin, J. D. Mahler and William J. Rigney, all of the city of New York, State of New York, are held and firmly bound unto the above named Raphael Tuck and Sons Co., Limited, in the sum of two hundred and fifty dollars, to be paid to the said Raphael Tuck & Sons Co., Ltd., for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and two.

Whereas the above named James McLoughlin has prosecuted a writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled suit, by the judges of the circuit court of appeals for the second circuit.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff shall prosecute said writ of error to effect and answer all damages and costs, if he shall fail to make his appeal

good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JAMES McLOUGHLIN.
F. D. MAHLER.
WM. J. RIGNEY.

50 Sealed and delivered, and taken and acknowledged this 26th day of April, 1902, before me

HENRY DISTLER,
[SEAL.] *Notary Public, Kings Co., N. Y.*

Endorsed: U. S. circuit court of appeals, second circuit. James McLoughlin, *vs.* The Raphael Tuck & Sons Co., Ltd., def't. Bond for damages and costs. Approved, April 30, 1902. E. Henry Lacombe, U. S. circuit judge. United States circuit court of appeals, second circuit. Filed May 9, 1902. William Parkin, clerk.

51 At a stated term of the United States circuit court of appeals for the second circuit, held at the court rooms in the post office building, city of New York, on the 2nd day of June, 1902.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, judges.

JAMES McLOUGHLIN, Plaintiff in Error,
vs.
THE RAPHAEL TUCK & SONS COMPANY, LTD., Defendant in Error.

On motion of A. Bell Malcomson, attorney for the plaintiff in error, it is hereby

Ordered that the time of said plaintiff in error to make a return to the writ of error issued herein be and it hereby is extended to the 10th day of June, 1902.

E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) United States circuit court of appeals, second circuit. McLoughlin, *vs.* Tuck. Order. United States circuit court of appeals, second circuit. Filed Jun- 2, 1902. William Parkin, clerk.

52 By the Honorable E. Henry Lacombe, one of the judges of the United States circuit court of appeals for the second circuit.

To The Raphael Tuck & Sons Co., Ltd., Greeting:

You are hereby cited and admonished to be and appear before a United States supreme court to be holden at the Capitol in the city of Washington on the 13th day of October 1902, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein James McLoughlin is plaintiff and you are defendant to show cause, if any there be, why the judgment in said writ of error mentioned should

not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 30th day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of these United States the one hundred and twenty sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

E. HENRY LACOMBE,
Judge of the Circuit Court of Appeals of the United States for the Second Circuit.

53 [Endorsed:] 1433 United States Supreme Court James McLoughlin *vs.* The Raphael Tuck & Sons Co. Ltd. Citation Service of a copy of within citation hereby admitted this 2nd day of May 1902. Louis C. Raegener attorney for def't. United States circuit court of appeals, second circuit. Filed May 9 1902 William Parkin clerk.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals before you, or some of you, between James McLoughlin plaintiff and The Raphael Tuck & Sons Company Limited defendant—a manifest error hath happened, to the great damage of the said James McLoughlin plaintiff as is said and appears by his complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 30th day of May 1902, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of April in the year of our Lord one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-sixth.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN,
Clerk of the Circuit Court of Appeals of the United States of America for the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

55 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the circuit court of appeals of the United States of America, for the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the *following* pages, numbered from 1 to 52 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause of James McLoughlin plaintiff in error, against Raphael Tuck & Sons Co., Ltd., defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 4th day of June in the year of our Lord, one thousand nine hundred and two and of the Independence of the United States the one hundred and twenty-sixth.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

[Endorsed:] 1433. Supreme Court of the United States. McLoughlin, plaintiff in error, *vs.* Tuck & Sons Co. defendant in error. Writ of error. United States circuit court of appeals, second circuit. Filed May 9 1902 William Parkin, clerk.

Endorsed on cover: File No. 18,586. U. S. circuit court of appeals, second circuit. Term No. 73 James McLoughlin, plaintiff in error, *vs.* The Raphael Tuck & Sons Company, Limited. Filed June 13, 1902.

Supreme Court of the United States

OCTOBER TERM, 1903.

JAMES McLOUGHLIN,
Plaintiff-in-Error,

vs.

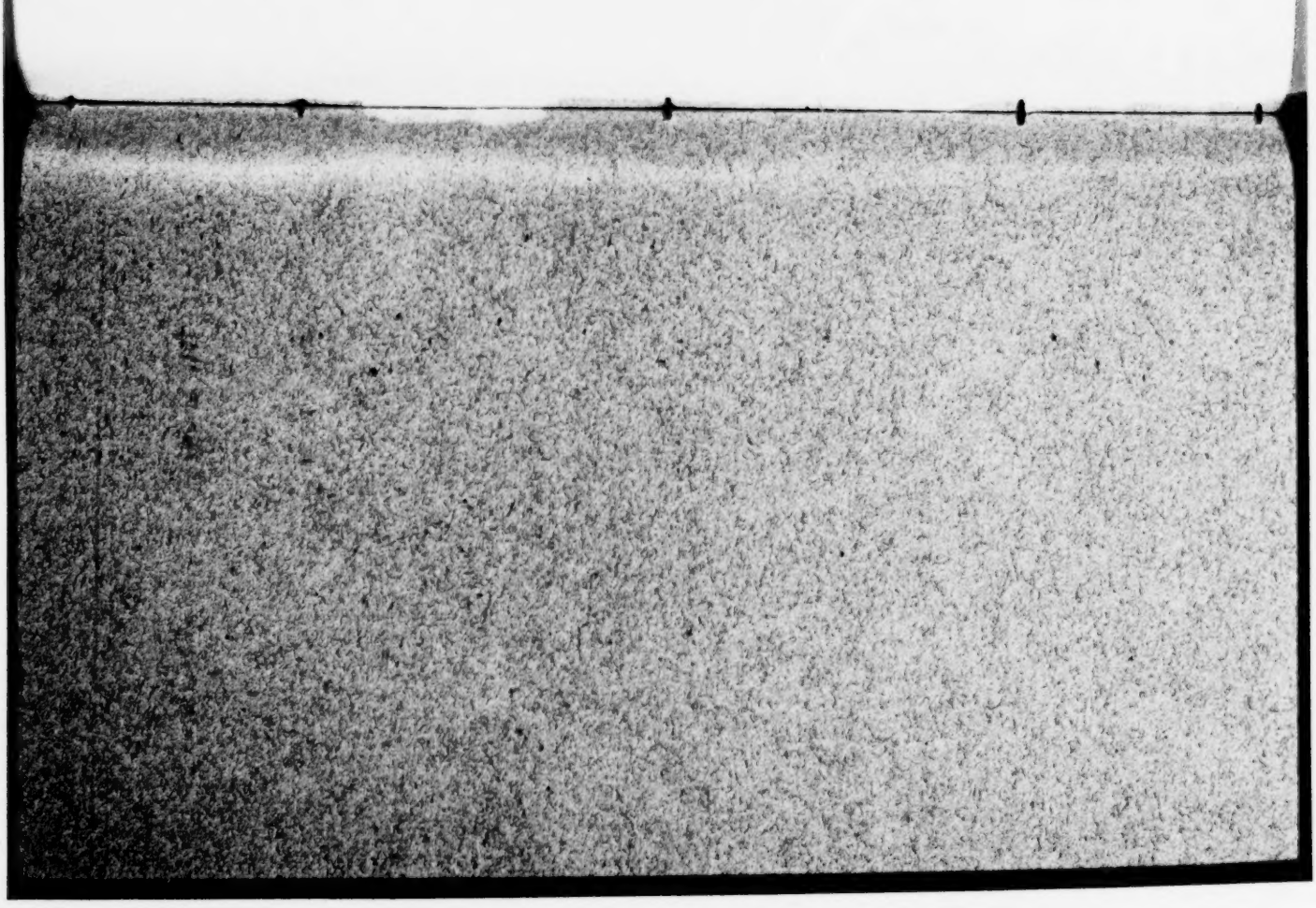
THE RAPHAEL TUCK & SONS COMPANY, LIMITED,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF-IN-ERROR

A. BELL MALCOMSON,
Counsel for Appellant.

APPEAL PRINTING CO., 14 Vesey St. TEL. 192 CORTLANDT.



Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM, 1903.

JAMES MCLOUGHLIN,
Plaintiff-in-Error,

vs.

THE RAPHAEL TUCK & SONS COMPANY, LIMITED,
Defendant in-Error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for Plaintiff-in-Error.

Statement.

This is an action for violation of the copyright law.

The provisions claimed to have been violated are contained in Section 4963 of the Revised Statutes.

The defendant is a publisher of books and calendars, consisting largely of highly colored chromolithographs. It is a New York corporation doing business in the City of New York, and all books, made for it, are specially prepared for publication and sale in the markets of this country.

Complaint.

The first seventy causes of action, set forth by the complaint, are that defendant published, in August, 1896, at the City of New York, and knowingly *inserted and impressed* a false notice of copyright, on seventy different books, described by names and numbers.

The remaining causes of action are for knowingly issuing and selling at the City of New York certain specified books with a false copyright mark on them in 1897.

The first seventy causes of action are based on the act of "*inserting or impressing*" the false notice in violation of Section 4963, as it read before the amendment of March 3, 1897.

The remaining causes of action are for the act of *selling* books falsely marked, such act being made a violation of the same section by the amended act of March 3, 1897.

Answer.

The answer, 1st, Admits that the defendant is a corporation formed under the laws of the State of New York, carrying on business in the City of New York (Par. II).

2nd. Admits the publication and sale in 1896 of the books complained of in the first 70 causes of action (Par. III).

3rd. Admits that the books bore a notice that they had been copyrighed by defendant and that they were proper subjects of copyright (Par. IV).

4th. Admits that the defendant had not obtained a copyright on the books and that such notice on them was false (Par. IV).

5th. Denies that defendant inserted or impressed the false notice of copyright of the books by defendant (Par. III).

Defendant's Admissions.

On the trial the defendant made the following admissions in open Court:

1st. Defendant admitted that the books were sold and published by defendant at the times alleged in the complaint, with the statement of copyright thereon (page 15, manuscript R).

2nd. That the printed statement on the books that a copyright issue had been obtained by defendant was false (p. 15).

3rd. That such false notice of copyright was inserted and impressed upon the books under the authority of the defendant (p. 15).

The plaintiff by request of the Court admitted that the books enumerated in the first seventy causes of action came from abroad in 1896 (p. 15).

It is self evident fact that the goods must have been brought into the country prior to 1897 if they were sold here in 1896.

These books are the one alleged in the complaint to have been issued and published in New York in 1896 and to have had the false notice o copyright impressed on them by defendant.

As to the books complained of in the seventy-first to the eighty-third cause of action, the defendant admitted:

1st. That all of said books were sold by defend. ant and had the false statement of copyright printed on them.

2nd. That such false notice that a copyright thereon had been ontained by defendant was inserted and impressed on the books by authority of defendant.

3rd. That the books numbered 1750 and 1754 were sold in June, 1897 (fol. 78) and the books

numbered 1738, 1739, 1740, 1741, 1742, 1748, 1749, 1750, 1751, 1752, were sold on or about the 26th of April, 1897 (fol. 80).

The Court then stated to defendant in relation to "these later books":

"Court: It put you to the proof to show affirmatively that they got in here before March 3, 1897."

Under this ruling the defendant was required to prove affirmatively that these books referred to in the later causes of action came under the proviso of the Amended Statute. The admissions covered all other points.

The only witness examined by defendant for this purpose was Samuel Gabriel, the secretary and treasurer of the defendant.

This witness testified:

1st. That book, No. 1742 (one of the books previously admitted to have been sold with the false notice impressed on it), was imported in May, 1897 (p. 18).

2nd. That he could not swear of his own personal knowledge that the other books were not brought into this country in 1897.

Defendant then attempted to prove also by this witness a contradiction of the admission that the books, including 1742, bore the false statement of copyright at time of sale.

Plaintiff moved to strike out such testimony as not pertinent and his motion was denied (p. 19).

On this case being presented the Court directed a verdict in favor of defendant, with all exceptions to plaintiff (p. 23).

5

POINTS.

I.

The plaintiff was entitled to judgment on the first seventy causes of action, and the plaintiff's exception to the direction of a verdict should have been sustained.

As to the first seventy causes of action the complaint alleges that the defendant at the City of New York in the State of New York, on August 1, 1896, issued certain books "and in and upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted, which notice was in the following words: 'Copyright 1896, by Raphael Tuck & Sons, Ltd.'" (Par. III of complaint).

This pleading was held to be a good allegation that the insertion of the notice was done at the City of New York.

The defendant demurred to this same language in another case and the Court held:

> "The obvious meaning of the allegations is that the publication and insertion of the notice was at the City of New York."

Rigney vs. Tuck, 77 Fed. R., 173.

The admission of defendant on the trial was full and complete as to the facts alleged in the complaint of inserting and impressing in 1896 (p. 15-16).

The admission of plaintiff that those seventy books were brought into the country in 1896 in no way affected the act of inserting and impressing of the false notice by the defendant at New York in August, 1896.

The law was in no way changed by the amendment of 1897 so as to affect these seventy causes of action.

The offense constituting the first seventy causes of action was the "inserting" in or "impressing" on the books a false statement of copyright.

Section 4963 remains as it originally stood in relation to the inserting or impressing of a false notice of copyright.

There was no repeal of the former statute by the amendment of 1897. The concluding clause of the amendatory act states:

> "That all laws and parts of laws inconsistent with the foregoing provision be and the same are hereby repealed."

The provisions in relation to impressing of a false notice are not inconsistent with, but are a part of the section as amended.

> "The doctrine that a statute is impliedly repealed by a subsequent statute revising the whole matter of the first, does not apply where the revisory statute declares what effect it is intended to have upon the former; as where it provides that such provisions of the earlier as are inconsistent with the latter act, are repealed. In such cases only such effect can be given to the revisory act, as it directs; only the provisions inconsistent are repealed."

Patterson vs. *Tatum*, *3 Sawyer*, *164*.

The publication of the books by defendant at the City of New York, with the false statement that they were copyrighted by defendant *printed on them, by the authority of* DEFENDANT, was the offense of inserting or impressing covered by the statute.

When interpreting this section of the statute, before amendment, in the case of Rosenbach vs. Dreyfuss, 2 Fed. R., 220, the Court said:

> "The offence is deceiving the public by the false assertion of a valuable privilege to which a party is not entitled."
>
> * * * * * *
>
> "The purpose of the statute seems to be to protect persons entitled to copyright from their privilege being impaired, cheapened and lessened in value by *the unauthorized assumption* of the privilege by persons not entitled thereto."

It was at the City of New York, where the books were issued and sold, that the offense and violation of the statute was committed.

Section 4962 requires a proprietor, as a prerequisite to an action for the infringement of a copyright, to "give notice thereof by inserting in the several copies of every edition *published* * * * the statement that the book is copyrighted."

The following Section, 4963, provides as follows:

> "Every person who shall insert or impress *such* notice, or words of the same purport, in or upon any book," etc., "shall be liable to a penalty."

It was said by the Circuit Court of Appeals in this circuit:

> "The statutes refer to a published edition, which is an edition offered to the public for sale or circulation."
>
> *Falk vs. Gast. Litho. & Eng. Co., 54 Fed. R., 890.*

It matters not where the mere act of printing is done. The books might be printed with the false statement of copyright on them and still there would be no violation of the statutes unless there was an "issuance coupled with a sale."

If the books containing the statement of copyright should not be published, of course there woould be n "*notice*" within the meaning of the statute. The mere printing would be of no avail and the public would not be deceived.

The distinct statement of the statute (Sec. 4963) that it applies to "*such notice*," referring back to Section 4962 has always been construed to mean more than the mere act of printing.

Where the issuing and sale by the party authorizing the printing on the book of the false statement that it is copyrighted by such person takes place, there the violation of the statute takes place. Even if it be contended that the admissions do not specifically cover the point, the defendant cannot avoid liability under the statute by claiming that the means for violating the law (the mere act of printing the words on the book), were prepared and done under his authority at some other place than New York.

A long line of decisions has established the law that it is at the place where the consummation of the wrongful act takes place that the statutes are violated.

The People vs. Rathburn, 21 Wend., 533.
The People vs. Adams, 1 N. Y., 175.
U. S. vs. Davis, 2 Summ., 485.
Tyler vs. People, 8 Mich., 326.
Secs. 730-2, U. S. Rev. Statutes.

A libel uttered in one country and published in another country is triable in the country where the libel is published.

Commonwealth vs. Blanding, 3 Pick., 394.

II.

The proviso in the amending statute has no relation to the "inserting or impressing" of a false notice of copyright.

Prior to the amendment a practice had grown up among foreign publishers of placing on books, designed for sale in this country, a false statement that there was a copyright by some unknown or fictitious person, on such books, by printing thereon the words prescribed by our statute to give notice of copyright The printed notice did not in any way refer by name to the party who put them on the market here, nor was the printing authorized by the importer.

The case of Rigney vs. Dutton, 77 Fed. R., p. 176, is an instance.

There the books were marked "Copyrighted by E. Nister" but imported and sold by Dutton. Under the statute before amendment Dutton could legally import and sell the books with the Nister claim of copyright, as he had no connection with the printing of the books.

The proviso of the amendment is in relation to the importation of, or sale of, such articles, bear- a false notice of copyright by some unknown or fictitious person, and was not required for cases where the *name of the publisher here* is contained in the false claim of copyright; or cases where the claim of copyright was printed on the book by authority of the person selling it here. Such act was illegal under the statute before amendment.

The language of the proviso is as follows:

> "Provided, That this act shall not apply to "any IMPORTATION OF, or SALE OF such "goods or articles brought into the United "States prior to the passage hereof."

The *importation of*, and *sale of*, falsely marked goods were the things against which the new parts of the Amending Act were directed. And a right to summarily enjoin the sale of such importations was given by the amendment. There is nothing in the proviso which states or implies that the act should not apply to violations of the statute before amendment by reason of "inserting or impressing" a false notice of copyright.

The violation of the statute admitted by defendant in this case is "impressing" a false notice on the books, *not the act of importing or selling a falsely marked book*.

It will be seen that the proviso is designed to, and would, protect such parties as Dutton, who might have imported, prior to the passage of the amendment, books containing a false claim that the books were copyrighted by "E. Nister" or other person with whom Dutton had no connection—and which statement of copyright Dutton had not authorized.

III.

Should it be held that by any implication the amendment repealed the old law, yet the plaintiff was entitled to judgment on the first seventy causes of action, which are for a liability incurred under the statute before amendment.

The statutes of the United States specifically provide that where a statute is repealed the liability for penalties is not released.

Reference to Section 13 of the Revised Statutes of the United States shows this to be the law.

"SEC. 13. The repeal of any statute shall not have the effect to release or extinguish any pen-

alty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

There can be no valid pretense that liability for offenses already incurred under the statute for *inserting or impressing* is released by any *express provision* of the amendment of 1897.

"General saving statutes providing that the repeal of a statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred thereunder are by law imported into the subsequent repealing acts, and obviate the necessity for individual saving clauses to save offenses committed before the repeal."

State vs. Hardman, 16 Ind. App., 357.

In relation to the first seventy causes of action arising in 1896 the case must be considered as if the amendment of 1897 had never been passed.

IV.

The Court erred in receiving testimony from defendant that the book 1742 did not have the false notice of copyright on it, and in refusing to strike it out and disregard it.

The defendant had admitted that all the books, including 1742, had a false notice of copyright impressed on them by defendant.

The defendant then attempted to prove that the book 1742 did not have the copyright mark on it. And the Court refused to strike such testimony out, to which plaintiff excepted.

"Any agreement deliberately made, any plain assent, express or implied, in respect to the orderly conduct of a suit, or even an agreement to admit a material fact upon the trial, cannot be revoked at the pleasure of the party."

"The Courts specifically enforce agreements made in respect to the course of the cause by persons properly authorized."

The People vs. Rathbone, 21 Wend., 543.

At the time of the trial of this case the defendant below had been driven from point to point in devising means to avoid responsibility for its frequent violations of the Copyright Law.

This is shown by the Rigney case where a demurrer was interposed.

Rigney vs. Tuck, 77 Fed. R., 173.

And by the Ross case; in the record of which it appears the witness Gabriel testified that defendant purchased the books in the open market and did not know anything about the marking or manufacture of them. Gabriel was substantially the only witness in the Ross case.

See opinion Cir. Ct. App.

Wallace, C. J.:

"There was no evidence tending to show "that the defendant had caused the insertion "of the fictitious copyright notice in the "books or knew that it was to be or had been "inserted previous to receiving the books."

Ross vs. Tuck, 33 C. C. A., 405.
Same case, 62 U. S. App., 317.

This Ross case is the one referred to in defendant's answer.

And by the Hortel case, which was another and later case and discloses a new device of defendant to evade the provisions of the law against false marking.

It is a case arising some time after the amendment of 1897 and this defendant is found still falsely marking books "copyrighted," and violating at least the spirit of the law, by using the copyright notice and leaving out the date so as to thereby avoid liability for the false marking.

The Court said in the Hortel case:

> "The records of this Court indicate that defendant is a persistent offender against the spirit of the Copyright Acts, but in this case it seems to have succeeded in escaping the express language defining the offense charged" (*Hortel vs. Tuck, 94 Fed. R., 844*).

In the present case, when brought to trial the defendant devised the specious course of admitting the inserting and impressing, which shut out all the testimony collected by plaintiff since the Ross case, going to show that instead of defendant having bought the goods in the open market, they were made for defendant under the personal direction of its officer Gabriel, for sale in the New York market and nowhere else.

Then having admitted on the trial that the books all bore the false mark he was allowed to contradict that fact as to the book 1742.

The admission was that the books all bore the false mark and that such mark was impressed by authority of defendant on them at time of publication.

The Court: You admit the sale and admit false notice?

Mr. Raegener: Yes, sir.

The witness of defendant is then asked:

"Q. Then the book referred to as 1742, and which is referred to in the 77th Cause of Action, and which it is alleged the defendant sold on or about April 26, 1897, did not have the copyright notice on?

A. It certainly did not."

This was an attempt to contradict the admissions already made by defendant. The plaintiff promptly moved to strike it out.

"Mr. Malcomson: I move to strike that testimony out as not being relevant."

* * * * * *

"The Court: Motion denied; exception."

Because the witness was expert in getting his answer in before he could be stopped, the plaintiff should not be prejudiced.

The testimony should be disregarded in view of the admissions already entered of record

Th admission should prevail over the attempt to contradict it.

Otherwise, the plaintiff would be prejudiced by the very act of admission by defendant.

Plaintiff's counsel did not avail himself of the Court's suggestion at the trial to cross-examine this interested hostile witness, on this point, of whether or not the book already admitted to have been falsely marked was in fact so marked.

When the admission was made that the book bore the false notice when sold, it is fair to presume that all plaintiff's witnesses and means for proving that fact were dismissed.

The admission was made for the purpose of having plaintiff forego all proof on that point.

Even in criminal cases proper admissions made at the trial cannot be retracted, or gainsaid by the party making them.

The People vs. Rathburn, *supra*.

V.

There was no reliable proof that the books mentioned in the 71st to the 83d causes of action were brought into the country prior to the passage of the amendment.

The defendant was required to prove affirmatively the fact that would bring the books within the proviso.

The Court: "It puts you to the proof to show affirmatively that they got in here before March 3, 1897."

The only proof offered was that of the witness Gabriel.

He makes general statements that the books (except 1742) must have been imported in 1896.

His testimony is found at p 17. Trans. of Record:

"Q. Those that you sold on the 11th of June, 1897. Before what date in what year were they imported?

A. They must have been imported in 1896. There is one exception, 1742."

But he has no personal knowledge on the subject by which he could so testify under oath.

He is asked on cross-examination:

"Q. Are you willing to swear of your own personal knowledge that those books were not brought into this country in 1897?

A. No, I will not swear."

This shows his testimony, that the books were imported in 1896, is merely hearsay.

All the testimony the witness gave was mere speculation, based on general konwledge. He would not swear to the time the books were brought into the country.

General conclusions of a witness, no matter how positively they may be stated, do not constitute affirmative proof of a fact.

The witness was a highly interested witness, the secretary and treasurer of defendant, and he would naturally state all conclusions as favorably as possible for the defendant.

It is respectfully submitted that the direction of a verdict for the defendant was erroneous and should have been reversed by the Circuit Court of Appeals.

A. BELL MALCOMSON,
Counsel for Appellant.

Addendum.

SECTION 4962, R. S., as amended by Act June 18, 1874, Forty-Third Congress, First Session, Chapter 301.

An act to amend the law relating to patents, trade-marks and copyrights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition *published*, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz: "Entered according to act of Congress, in the year , by A. B., in the office of the Librarian of Congress, at Washington;" or, at his option the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out; thus: 'Copyright, 18 , by A. B."

Approved June 18, 1874.

SECTION 4963, R. S., IN 1896.

Statute before Amendment.

Section 4963, as amended by the Act of March 3, 1891, was as follows: "Every person who shall insert or impress such notice, or words of the same purport, in 'or upon any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States."

Amendment of 1897.

An Act to amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section forty-nine hundred and sixty three of the Revised Statutes of the United State be, and the same is hereby, amended, so as to read as follows:

"*Sec. 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph or other article*, whether such article be subject to copyright or otherwise, *for which he has not obtained a copyright*, or shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo, or lithograph or other article bearing such notice of copyright or words of the same purport, which is not copyrighted in this country, *shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty and one half to the use of the United States;* and the importation into the United States of any book, chromo, lithograph, or photograph, or other article bearing such notice of copyright, when there is no existing copyright

thereon in the United States, is prohibited; and the Circuit Courts of the United States sitting in equity are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the United States copyright laws, at the suit of any person complaining of such violation: *Provided*, That this Act shall not apply to any *importation* of or *sale* of such goods or articles brought into the United States prior to the passage hereof."

SEC. 2. That all laws and parts of laws inconsistent with the foregoing provision be, and the same are hereby, repealed.

Approved, March 3, 1897.

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Supreme Court of the United States.

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JAMES H. McKENNEY,
Clerk

OCTOBER TERM, 1903

No. 73.

JAMES McLOUGHLIN,

Plaintiff in Error.

vs.

RAPHAEL TUCK & SONS' COMPANY, LIMITED,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LOUIS C. RAEGENER,
HAROLD BINNEY AND
S. L. MOODY,

Of Counsel for Defendant.

WM. SIEGRIST, Law Printer, 146 148 Worth Street, New York.

1903

Supreme Court of the United States.

JAMES McLOUGHLIN,
Plaintiff in Error,

against

RAPHAEL TUCK & SONS' COMPANY,
Limited,
Defendant in Error.

Oct. Term,
1903.
No. 73.

BRIEF FOR DEFENDANT IN ERROR.

This action was brought under U. S. R. S., Sec. 4963, as amended by Act of March 3, 1897, to recover the penalties therein prescribed for certain alleged impression by defendant of false notices of copyright upon certain picture books and for certain sales of books bearing such false notice since the passage of the Act.

The complaint contains eighty-three causes of action relating to eighty-three separate picture books. According to agreement and stipulation (Record, p. 3). the complaint is printed in condensed form, From the record it appears that as to the books in the first seventy causes of action the allegation is that the defendant "on or about the 1st day of August, 1896, * * * did publish and issue a certain picture book or booklet * * * * * * * and in and upon said book did knowingly insert and

impress a false and fictitious notice that the same was copyrighted, which notice was in the following words: 'Copyright 1896 by Raphael Tuck & Sons, Ltd.'" (Record, pp. 4-6.)

The seventieth, seventy-first and seventy-second causes of action, according to the record (Record, p. 6) state the same thing; but this is an error, as the original complaint alleged in the seventy-first and seventy-second causes of action that the issue and sale was on June 11, 1897, and did not charge defendant with inserting or impressing the notice. The record (p. 16) shows this fact, and plaintiff's counsel made the same assertion in his brief below. Defendant does not care to take any advantage of this mistake in the condensed complaint printed in the record.

The seventy-third to eighty-third causes of action allege only issue and sale by defendant on the 26th day of April, 1897 (Record, p. 7.)

The complaint alleges three offenses by the defendant:

1. Publishing,

2. Issuing; and

3. Impressing the false and fictitious notice of copyright.

The statute denounces but two offenses which the complaint can possibly cover:

1. Inserting or impressing the false notice of copyright.

2. Issuing or selling the book bearing such false notice.

Therefore the allegation as to publication is immaterial. Moreover, it is neither proved nor admitted.

The complaint does not allege sale by the defendant, unless issuing shall be deemed a sale.

Upon the trial of the action the defendant admitted (p. 15) as to the first seventy causes of action, that it had sold the books at the time alleged in the complaint, viz., August 1, 1896, with the notice of copyright impressed thereon. It also admitted that the said copyright notice was not true, that the books had not been copyrighted in this country, and that the copyright notice was false. It is also conceded "*for the purposes of the present trial of this cause of action, without prejudice to controverting it hereafter at any future time,*" that the notice was impressed upon said books under the authority of the defendant. Plaintiff's counsel (p. 15) also admitted that these books came from abroad in 1896; that is, before the amendment of March 3, 1897.

As to the seventy-first and seventy-second causes of action, defendant (p. 16) admitted that the two books were sold by it on June 11, 1897, as alleged in the complaint. Defendant's counsel, however, refused to admit that said two books were imported prior to March 3, 1897.

As to the seventy-third to eighty-third causes of action, defendant (p. 16) admitted sale on or about April 26, 1897, and admitted that the notice of copyright was false, and that it was impressed by the authority of the defendant. No admission as to the date of importation of these books was made by the plaintff.

The defendant then called Samuel Gabriel, the secretary and treasurer of the defendant company, who testified absolutely and distinctly and without qualification that all the books except No. 1742 (which constitutes the twenty-fifth cause of action) were imported into this country in 1896, and before the amendment of March 3, 1897 (Record, pp. 17–22).

Plaintiff's counsel attempted in every way to brow-beat and confuse the witness on this point and was repeatedly called to order by the court, and finally after the importation prior to 1897 was proved beyond the possibility of the shadow of a doubt, and after the court apparently became weary of trying to stop the brow-beating of the witness, plaintiff's counsel asked the following question (p. 23):

> "Q. Are you willing to swear of your own personal knowledge that those books were not brought into this country in 1897?"

to which the witness answered:

> "A. No, I will not swear."

Upon the strength of this one answer plaintiff's counsel asserted in his brief in the Circuit Court of Appeals that Mr. Gabriel had no knowledge of the facts and could not testify as to the importation of the books and refused to swear. The whole evidence of this witness is to the direct contrary and this answer at the best is merely the incautious answer of a witness badgered almost beyond endurance and convinced that the trial Judge was already satisfied of the fact that the books were actually imported prior to 1897.

As the brief for plaintiff in error has not yet been filed, we cannot know what it will contain; but in his brief in the Circuit Court of Appeals, counsel for plaintiff in error made several false or inaccurate statements. As these may very probably be repeated in this Court, we take this opportunity of answering them:

1. In his brief below counsel for plaintiff in error stated that the answer admits the *publication and* sale of the books complained of in the first seventy

causes of action (p. 9). This is false. The answer does not admit publication and admits sale only in the year 1896.

2. In his brief below counsel for plaintiff in error stated that defendant admitted that the books were sold *and published* by defendant at the times alleged in the complaint, with the statement of copyright thereon (p. 15.) This statement also is false. Defendant did not admit that the books were published by defendant either at the times alleged in the complaint or otherwise.

3. In his brief below counsel for plaintiff in error stated that Samuel Gabriel, secretary and treasurer of defendant, testified that he could not swear of his own personal knowledge that the books were not brought into this country in 1897 (p. 23). This statement also is essentially false. The testimony of Gabriel upon this point is as follows:

> "Q. You are familiar with the subject matter of this controversy and you have heard some of the admissions here? A. Yes, sir.
>
> Q. The admissions that were made just now are as follows: That the defendant sold a book known as No. 1750 and another known as No. 1754 on June 11, 1897. Will you please tell us when these two books were imported into the United States?
>
> *The Witness.*—Am I permitted to tell the story in my own way?
>
> *The Court.*—No; answer the question.
>
> Q. Those that you sold on the 11th of June, 1897, before what date, in what year, were they imported?

A. They must have been imported in 1896; there is one exception to that, No. 1742.

The Court.—You are asked about 1750 and 1754 : give careful attention to the question and only answer the question ; nobody asked you about 1742.

The Witness.—The books were imported in 1896.

Q. The books which I have referred to in my question ?

A. Yes, sir.

Q. Then, in order that we may understand you correctly, you wish to say that with the exception of a book or books, bearing the number 1742, all the other books that have been referred to in this litigation were imported in 1896; is that so ?

A. Yes, sir.

By the Court :

Q. Can you tell what time that book was sold ?

A. This particular book ?

Q. Yes.

A. No, sir.

Q. Can you tell whether or not it was imported prior to March 3, 1897 ?

A. Yes, sir; it was imported in 1896.

By Mr. Malcomson :

Q. How can you tell ?

A. Because none of the publications ordered in 1895, and imported in 1896, were brought here in 1897.

Q. How do you know that ?

A. In the first instance, because it is the

rule; in the second instance, I have taken trouble to examine that, and have gone into it very carefully.

Q. And have you personal knowledge in relation to that book?

A. I have.

Q. You have no personal knowledge of the actual entry or time of entry of those books which are before you now, have you?

A. Yes; I have personal knowledge that they were all imported during 1896.

Q. That all of those were?

A. All these books.

Q. The books were in your establishment in 1897, weren't they?

A. Possible some were there in 1897, but they were also there in 1896.

Q. But they were imported from time to time?

A. Not in 1897; there is no question about that.

Q. You cannot say when any one of those particular books were entered through the Custom House.

A. Except that they were entered in 1896.

Q. If you cannot say when any one of those individual books passed through the Custom House, how can you say, unless you passed every one of such books through the Custom House, when they were imported into this country?

A. By referring to the invoices; I have studied these invoices and found that during 1897 not one of the books in the complaint, 1742 excepted, arrived in this country.

(Pages 17–22, *passim.*)

The whole case, therefore, rests upon the pleadings, the admissions by the parties and the testimony of Samuel Gabriel. It will be noticed that there is no admission by the defendant that it *issued* or *published* any of the books complained of, nor is there any admission as to the *time* when the false notice of copyright was impressed upon said books by its authority. There is an admission that the false notice was impressed upon the books by the authority of the defendant at some unknown time, and that the defendant did sell books with such false notice at the times alleged in the complaint. Of course such sale was, in the language of the Statute, "knowingly."

The plaintiff, therefore, has under the Statute on its own contention, two causes of action against the defendant; one for inserting or impressing a false notice of copyright; the other for knowingly selling books bearing such false notice. As to the *selling* of the books complained of, the defendant is plainly relieved by the proviso at the end of U. S. R. S., Sec. 4963, which reads as follows:

> "Provided, That this Act shall not apply to any importation of or *sale* of such goods or articles brought into the United States prior to the passage thereof."

As to the first seventy causes of action, the complaint itself alleges such sale prior to the passage of the Act. As to the remaining causes of action, the testimony of Samuel Gabriel shows that all the books complained of, except No. 1742, were imported prior to the passage of the Act, and not subsequently. As to No. 1742, he testifies (p. 18), that this book was imported in May, 1897, but did not have the copyright notice on. Plaintiff's counsel objected to the testimony that this book lacked the copyright notice, but this objection is

without weight, and the fact is immaterial, since the complaint itself alleges in the twenty-fifth cause of action that this book was "issued" on or about August 1, 1896, before the passage of the Act, and the admission of plaintiff's counsel (p. 16) that this book was imported March 3, 1897, relieves the defendant.

As to the offence charged of inserting or impressing the false notice of copyright, we rely upon three points:

1. That the admission by the defendant as to the impressing of this notice by its authority is insufficient to sustain the complaint, for the reason that it does not admit any date when the notice was impressed, and that there is nothing in the record or the evidence to fix this date with any such certainty as is required by the law in actions of this kind.

2. That the action, being brought under the Statute as amended March 3, 1897, cannot cover acts committed prior to the passage of such amendment.

3. That the act was without the jurisdiction.

SUMMARY.

The first seventy causes of action charge two offenses: (1), impressing the false notice, and (2), selling the books bearing such notice. Under the admission of plaintiff's counsel (Rec., pp. 15–16) that these books were imported prior to the passage of the act, the proviso of the act applies, the second charge falls, and only the charge of impressing the false notice remains to be considered.

The remaining thirteen causes of action charge only one offense, viz.: knowingly issuing and sell-

ing the books bearing a false notice of copyright since the passage of the act as amended. The issuing is neither admitted nor proved. The sale is admitted. But the evidence of the witness Gabriel shows that all these books also were imported prior to the passage of the act, and the proviso of the act again applies, and these thirteen causes of action fail completely.

POINT I.

Plaintiff's own admission (Rec. pp. 15–16) **precludes recovery for defendant's sale of the books mentioned in the first seventy causes of action.**

(Proviso of Sec. 4963.)

POINT II.

The proof by the witness Gabriel precludes any recovery under the remaining thirteen causes of action.

(Proviso of Sec. 4963.)

POINT III.

The admission of proof that the book *1742* did not bear the copyright notice was not material error.

As to book *1742*, the witness Gabriel testifies (Rec. p. 18), that it was imported in May, 1897,

after the passage of the act as amended; but he also testifies (Rec. p. 18) that this book did not bear the copyright notice. When the witness reiterates this statement, plaintiff's counsel (p. 18) moves to strike out the testimony; but the motion comes too late, the question not having been objected to, and the witness (p. 18) having already given this testimony without objection.

Plaintiff's counsel argues at length in his brief below that the refusal of the Court to strike out the testimony, was material error because defendant's counsel had admitted (Rec., p. 16), that this book, among others, did bear the false notice of copyright. He overlooks entirely, however, the fact that, as this book *1742* is the subject of the twenty-fifth cause of action (Rec. p. 5), his own admission (Rec., p. 16), that the books mentioned in the first seventy causes of action were imported prior to March 3, 1897, covers this book *1742*, and that therefore no penalty for the sale of this book can be recovered. The testimony of the witness therefore, that it was imported in May, 1897, being subsequent and contrary to plaintiff's own admission, cannot be availed of by him, and if there was error it was immaterial as regards the seventy-seventh cause of action.

It is also immaterial as regards the twenty-fifth cause of action, because, even admitting that this book did bear the false notice of copyright, neither the twenty-fifth nor any of the first seventy causes of action has been proved. The charge of wrongful selling has already been disposed of, and the charge of wrongfully impressing the notice will be disposed of in Point IV.

POINT IV.

Plaintiff has not Proved His Right Under the Statute to Recover any Penalty for the Insertion or Impression by Defendant of any False Notice of Copyright upon the Books Mentioned in the First Seventy Causes of Action.

First.—Plaintiff has not proved that the false notice of copyright was inserted or impressed since the passage of the statute.

(1.) The defendant merely admits that the notice was false and was impressed upon these seventy books under the authority of the defendant. There is no admission as to the time when such notice was impressed, nor was any such admission asked or suggested (Rec. p. 15).

(2.) This is a penal action. The admission was dictated by the Court without suggestion of amendment by either party. No speculation, therefore, as to the possible intentions or concealed understandings of the parties is permissible, and the admission must be taken in the plain and obvious meaning of its terms. Neither publication nor issue of these books is proven.

(3.) Section 4963 was originally enacted July 8, 1870, and in its present amended form March 3, 1897. Before plaintiff can recover any penalties under this statute he must prove that the acts complained of were committed after the passage of the statute. This is elementary, and the statute itself shows that it is not retroactive, because it states that "Every

person who *shall* insert or impress" such false notice shall be liable. Plaintiff has failed to prove this or any facts from which the date of insertion or impression can be deduced.

(4.) If the notice "Copyright 1896" were true there might possibly be a presumption that it was inserted in the natural course of business and therefore in or since the year 1896. The fact and the admission, however, both are that the notice is false, and therefore no such presumption can be entertained.

(5.) If the purpose of impressing such notice were material, it might be reasonably presumed that the purpose was to make the public think the book had been copyrighted, and, therefore, the further presumption might possibly arise that such notice had been impressed after the date alleged for copyrighting. In these actions, however, the purpose of the defendant in impressing such notice is utterly immaterial, as the courts have repeatedly decided. No such presumption, therefore, can be drawn from any supposed purpose of the defendant.

There is nothing in this case which lays any foundation for fixing with reasonable certainty or any degree of probability the date when such notice was impressed. The proof fails to show such date, and is therefore not exclusive of a reasonable probability that such notice might have been impressed before the passage of the Act, when no offense would have been committed or penalty have accrued.

Second.—The impression of the notice was prior to the passage of the act under which suit is brought.

Although no date of impression is proven, yet the conclusion is inevitable that if the books bearing

this notice were actually sold on August 1, 1896, the notice must have been impressed prior to this time and prior to the passage of the act. This act says that "Every person who *shall* insert or impress such notice," etc., shall be liable. The act does not apply to past offences.

From plaintiff's brief in the Circuit Court of Appeals, we learned for the first time that plaintiff now claims that "The first seventy causes of action are for a violation of Section 4963, as it read before the amendment of March 3, 1897." This statement is false and the claim is inadmissible. The summons gives no notice of this, neither does the complaint; and the allegations of the complaint (Rec., p. 4) are absolutely inconsistent with such a supposition. The statute pleaded is necessarily the statute existing at the time the action is commenced unless otherwise expressly stated. The plaintiff has not pleaded two statutes. He has pleaded, urged and attempted to prove claims under the statute of March 3, 1897, and cannot be now allowed for the first time on the appeal to assert that his action was brought upon another statute. If the defendant had received the slightest intimation of such a claim, it would not have made, nor would the Court have asked it to make, the admission upon which alone these causes of action can be founded.

Third.—Recovery for the impression charged in the first seventy causes of action is barred by the limitation of Section 4968.

As the impression must have been prior to the sale, and the sale is alleged and proved as of August 1, 1896, the impression must have been more than two years before the commencement of the action. The Statute of Limitations was properly pleaded (Rec. p. 11.)

Fourth.—The proviso of Section 4963 covers the impression proved and relieves from the penalty.

Plaintiff argued at some length in his brief below that the offence of impressing the false notice was committed and completed only by the publication and issue of the books by defendant, at the City of New York, on August 1, 1896. Neither publication nor issue is proved or admitted, but plaintiff seems to assume that the sale admitted is such publication and issue.

If this position of plaintiff be correct, then it necessarily follows that the proviso of Section 4963 applies to the impression also; for, if the proviso forgives the sale, and the sale is necessary to the completion of the offense of impressing the notice, then this offense itself must also be forgiven. An essential part of the offense being destroyed, the offense can no longer exist.

Fifth.—The act as amended repealed the former act.

If the last position is correct, then the proviso of the act as amended forgives a wrongful insertion or impression of copyright notice prior to its passage, and the former act is therefore inconsistent with its provisions and repealed.

POINT V.

The action not being brought under the old statute, no penalty under that statute accrued, and Section 13 of the Revised Statutes does not apply.

POINT VI.

The amendment of March 3, 1897, repealed the former act, and bars any recovery thereunder.

POINT VII.

The insertion of the copyright notice in Germany, even if it were the act of the defendant, was committed beyond the jurisdiction and cannot be reached by the Statute.

(See opinon below, Rec. pp. 27-28.)

In this connection it should be remembered that the admission (Rec. p. 15) that the impression of the false copyright notice was by authority of the defendant, was dictated by the Court, and was only for the purposes of that trial and "without prejudice to controverting it hereafter at any future time."

The Court of Appeals, when it animadverts upon the conduct of the defendant, appears to have overlooked this fact.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Dated November 10, 1903.

Respectfully submitted,

LOUIS C. RAEGENER,
HAROLD BINNEY,
and S. L. MOODY,
Of Counsel for Defendant.

Supreme Court of the United States.

No. 73.—October Term, 1903.

James McLoughlin, Plaintiff in Error, vs. The Raphael Tuck & Sons Co., Limited, Defendants in Error. } In error to the United States Circuit Court of Appeals for the Second Circuit.

[November 30, 1903.]

Mr. Justice White delivered the opinion of the Court.

Section 4963 of the Revised Statutes, as amended by the act of March 3, 1891, relating to the notice of copyright to be affixed to copyrighted articles, provided as follows:

"Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty, and one-half to the use of the United States."

On March 3, 1897, the foregoing provisions were amended (29 Stat. 694), by the following:

"Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving or photograph or other article, whether such article be subject to copyright or otherwise, for which he has not obtained a copyright, or shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo, or lithograph or other article bearing such notice of copyright or words of the same purport, which is not copyrighted in this country, shall be liable to a penalty of one hundred dollars, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States; and the importation into the United States of any book, chromo, lithograph, or photograph, or other article bearing such notice of copyright, when there is no existing copyright thereon in the United States, is prohibited; and the Circuit Courts of the United States sitting in equity are hereby authorized to enjoin the issuing, publishing, or selling of any article marked or imported in violation of the United States copyright laws, at the suit of any person complaining of such violation: *Provided*, That this act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof."

The state of the law prior to 1897, pertinent to this case, was therefore this: A penalty was imposed of $100 for untruthfully impressing upon an article which was subject to be copyrighted in the United States the fact

that the same had been copyrighted, but there was no provision or penalty concerning the importation from a foreign country of an article which was untruthfully stamped in such country as having been copyrighted in the United States, and no express provision or penalty concerning the sale of an article in the United States which was untruthfully stamped as copyrighted. The amendment of 1897 caused the previous provision as to untruthfully stamping a notice of copyright to apply, although the article was not subject to copyright under the law of the United States, and prohibited the importation of an article untruthfully stamped from a foreign country, and also prohibited the sale of an article in the United States which was falsely stamped, the penalty previously provided being made applicable to the added prohibitions.

The plaintiff in error in 1898 commenced this action in the Circuit Court of the United States against the defendant in error, to recover the $100 penalty, provided in the statute, for each of eighty-three alleged distinct violations of the statute. The basis of the first to the seventieth cause of action was asserted to be that on or about the first day of August, 1896, the defendant, "at the city of New York, in the State of New York, did publish and issue a certain picture book or booklet," (a distinct article being named in the statement of each of the seventy distinct causes of action,) "and in and upon said book did knowingly insert and impress a false and fictitious notice that the same was copyrighted . . ." The seventy-first and seventy-second causes of action charged that the defendant on the eleventh day of June, 1897, in the city of New York, "did knowingly issue and sell a certain picture book," described therein, with a false notice of copyright stamped on it. The seventy-third to the eighty-third and last cause of action charged the commission as to different publications, of like acts, in the city of New York on or about April 26, 1897.

On the trial to a jury the defendant admitted that all the publications referred to had on them an untruthful statement that they had been copyrighted under the laws of the United States, which statement had been affixed in a foreign country at their request and for their account. It was also proved by the defendant, without conflict in the testimony, that all the publications having on them the untruthful statement of copyright were imported into the United States prior to the enactment of the amendment of 1897. Under this state of the proof the trial court instructed a verdict for the defendant. Error was prosecuted by the plaintiff to the Circuit Court of Appeals and that court affirmed the judgment. (115 Fed. Rep. 85.) The court held that the penal provisions of the law had no extraterritorial operation, and therefore did not embrace the act of affixing in a foreign country to a publication a false statement that it was copyrighted under the laws of the United States. Concerning the sales made after the passage of the amendment of 1897, the court held that the

trial court had correctly instructed the jury that as the books so sold after the amendment of 1897 were imported into the United States prior thereto, the right to sell them in the United States was saved by the proviso of that amendment.

The court below was clearly right in its conclusions as to the non-extra-territorial operation of the law as it stood prior to the amendment of 1897. (*Flash* v. *Conn*, 109 U. S. 376.) In saying this we do not wish to be considered as holding that where an act done in a foreign country against a penal provision of the law of the United States is but the initial step in accomplishing a subsequent violation in the United States of other penal provisions, that the act done in the foreign country might not, under some circumstances, be treated as having been performed in the United States. On this question we intimate no opinion whatever, as the circumstances of the case do not require us to do so. Under the law as it stood prior to 1897 there was no provision forbidding the importation of an article falsely stamped in a foreign country, or prohibiting the sale in the United States of an article falsely stamped. There could, therefore, be no possible relation between subsequent lawful acts performed in the United States concerning the article falsely stamped in a foreign country.

The court was also manifestly right concerning the articles falsely stamped which were imported into the United States prior to the amendment of 1897, but sold in the United States subsequent to that amendment. The proviso expressly excluded from the operation of that amendment "any importation of or sale of such goods or articles brought into the United States prior to the passage hereof." Whilst this was not disputed in the argument at bar, it was insisted that the court below erred in affirming the act of the trial court in instructing a verdict on this subject, because the evidence did not unquestionably establish that the articles which were sold after March 3, 1897, were in fact imported prior to that date. To support this contention the evidence which is contained in the bill of exceptions is referred to. We are of opinion that the claim is without merit, and that from the testimony, as preserved in the bill of exceptions, it results that the trial court correctly instructed the jury on the subject.

It is urged, however, that error was committed by the trial court in the admission of proof concerning the date of the importation of the articles sold after March 3, 1897. Whilst we think the contention is without merit, we shall not review the grounds upon which it is based, because it is not open to inquiry upon the record before us. No error concerning the admission or rejection of testimony was assigned in the Circuit Court of Appeals, and that court, in considering the case, treated it as involving only two issues, the extraterritorial operation of the provisions of the law, as it stood prior to March 3, 1897, and the effect of the proviso which formed a part of that amendment. And this upon the asumption that the correct-

ness of the ruling of the lower court concerning the admission of testimony was unchallenged by the plaintiff in error. We say upon the assumption, since the opinion of the Court of Appeals makes no reference to any question concerning the admissibility of testimony, and because the assignment of errors made for that court was directed to the adequacy of the "admissions and testimony." to sustain the action of the trial court in instructing a verdict.

Affirmed.

Mr. Justice HOLMES did not hear the argument and took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.